POLICE-PROSECUTOR RELATIONS IN THE UNITED STATES

FINAL REPORT

BY

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SUMMARY OF THE ABSTRACT

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ABSTRACT

This project was designed to: (1) describe the relationship between police and prosecutors in jurisdictions with populations of over 100,000; (2) identify the main conflicts, weak points and perceived problems in that relationship; and (3) analyze the causes of, potential remedies for and the desirability of resolving such problems.

The study is based primarily upon semi-structured interviews with 205 law enforcement officers and 85 prosecutors in 16 purposefully selected jurisdictions. In addition, five other sources of information were used including a telephone survey of prosecutor and police agencies in a stratified random national sample of jurisdictions; a case-disposition decision simulation administered to police and prosecutors; self-completed questionnaires and panel discussions with police and prosecutors attending national gatherings; interviews with a few defendants and defense counsel; and a secondary analysis of some interview and case-disposition data obtained in a previous study of plea bargaining.

Our major findings and conclusions are summarized below. The fundamental linkage between the work of police and prosecutors is the processing of cases (as distinct from people processing). This work is most usefully conceived of in terms of information processing and decision making. That is, police and prosecutors operate a communication system in which the police are supposed to discover, collect, store and transmit case and

defendant information which prosecutors need for their various decisions. From the point of view of prosecuting cases fairly, effectively and efficiently, the main weaknesses in the police-prosecutor relationship lie in one or more aspects of this communication system. The primary and most common sources of weakness are: (1) insufficient training and incentive among police to supply prosecutors with the amount and kind of information needed; (2) the constricting and inadequate nature of the existing documentary and electronic channels for communication between police and prosecutors; (3) scheduling problems and the related high cost of police overtime pay connected with case processing; and (4) organizational arrangements within and between police and prosecutor agencies which achieve less than the ideal communication arrangement of providing the prosecutor who is making the critical decisions in a case from personally communicating with the police officer(s) most familiar with the case.

These weaknesses should be remedied by: (1) police training programs emphasizing knowledge of the elements of crime but especially providing police with the opportunities to learn directly from local prosecutors (by observation and instruction) how the quality of information in a case affects the disposition decision; (2) prosecutorial feedback to the police on individual cases including at a minimum the dispositions and the reasons for them; (3) redefining the police role in a case as ending with conviction rather than arrest and, accordingly, developing incentives that would give the police a stronger interest in

making all cases they refer for prosecution as strong as possible; (4) organizing the case transfer process between police and prosecutor offices in such a way as to approximate (as close as feasible within local constraints) the arrangement in which the police officer with the most knowledge abut the case communicates directly with the prosecutor in charge of making the critical decisions as early in that process as possible; and (5) providing the means by which special knowledge and concern on the part of the police about an individual case or defendant can be reliably transmitted to the prosecutor in charge of the case. In addition, because of the major costs in transportation and police overtime pay associated with the case processing, the feasibility of making greater use of telecommunication linkages between police and prosecutor offices should be explored, including in particular the possibility of developing a computer-assisted case-evaluation and report-generating system.

The general level of cooperation and coordination between police and prosecutors continues to need improvement in many jurisdictions, where the "traditional antagonism" between these two agencies continues to exist. Cooperation is more likely to occur when a climate of trust between the two organizations has been established. Establishing and maintaining such trust is not easy but can be initiated by either agency. Various specific tactics can be used but the general strategy is to conduct one's agency's operations in such a way as to demonstrate to the other agency that your agency is non-political, competent and genuinely interested above all else in the fair, efficient and effective

administration of justice.

The division of labor between police and prosecutors is not clear cut or fixed. This causes some problems and friction. At the individual level, occasionally police try to play prosecutor and vice versa. At the organizational level there is occasional competition between organizations over control of cases as well as attempts to transfer to the other organization miscellaneous costly tasks associated with the processing of cases. This lack of clear definition of responsibilities occasionally results in cases falling between the cracks resulting in failures of justice and adverse publicity. The matter of the division of responsibility for specific tasks in a jurisdiction should be resolved by local understandings worked out between the relevant organizations.

One aspect of the division of labor between police and prosecutors is undergoing continuous historical change. Prosecutors have been expanding the scope of their activities into the earliest stages of the justice process to include control over the initial charging decision. Although this change has been endorsed by national commissions it has been resisted (and, in a few places successfully delayed) by the police. Moreover, it is far from complete. In 51% of jurisdictions over 100,000 population the police still control the initial charging decision. This has two significant consequences: (1) the police decision regarding initial "police" charges substantially affects the pretrial release decision. (2) The social and financial savings to defendants and the state that might be achieved by

prosecutorial screening prior to initial filing are not being realized.

Given the discrepancy between large caseloads and limited criminal justice resources, a system of selective enforcement of law must be operated by both police and prosecutors. This system should be based on lawful and rational criteria of selection promulgated in policies formulated by the police and prosecutors in consultation with each other and the public; should provide for review and accountability of the decisions made; and should seek to maximize the earliest possible attrition of weak and low priority cases. Prosecutors should play the primary role in this selection process. However, consideration should also be given to police participation in two special ways. The police should limit the number of arrests of selected crimes and, where authorized, should make greater use of their power to release after arrest without referral to the court.

Police and prosecutors share a concern and a legal responsibility for both controlling crime and assuring the due process of law. But in practice police are more sensitive than prosecutors to the demand for crime control; and prosecutors are more sensitive than police to the requirements of legality. This represents an unanticipated but significant benefit offsetting some of the inefficiency of the American arrangement of dividing the law-enforcement/prosecution function between independent organizations. The preservation of these two equally important but often conflicting values seems to be more fully assured by this arrangement. When conflicts arise between the two values,

one cannot easily be suppressed in favor of the other. The main complaint prosecutors have about the police is that they do not provide prosecutors with the amount and kind of information prosecutors need. The main complaint police have about prosecutors is that they dispose of too many cases by rejection, dismissal and plea negotiation. A second widespread police complaint is about the scheduling of cases for prosecutorial review or court appearance. The complaint is that in their scheduling decisions prosecutors (and the courts) do not sufficiently concern themselves with police considerations, especially the high cost of overtime pay.

In addition, both groups hold certain complaints about each other in common, namely, that the other (a) lacks competence; (b) is difficult to coordinate and communicate with; (c) is too "political," too concerned with establishing statistical "track records" that make them look good in the public eye; and (d) does not understand the functions of or constraints on the first agency.

The complaints each group has against the other are deeply felt and occasionally expressed in heated interpersonal exchanges and revenge or avoidance tactics at both the interpersonal and interorganizational levels. Each group is aware of and can accurately predict most of the main complaints the other group has against them.

Lying behind the police complaint about overly lenient prosecutorial disposition practices are four distinct issues: (1) To some extent this complaint reflects the lack of

understanding among the police of the constraints under which prosecutors operate and what it takes to get convictions in cases (2) To some extent, the complaint is a misstatement of the true complaint. That is, it was found that for some crimes the police would actually make the same or even more lenient decisions than prosecutors if given the chance. The real issue is not about outcome but about allowing police to have input into decisions and the status-conferring implications of such police input. The police become invested in their cases and feel that their opinion of and knowledge about them should be taken into account in the disposition decision making. When this is done they are significantly more satisfied with the outcome decision.

(3) For some crimes, especially vice offenses, the police complaint about prosecutorial non- or underenforcement represents differences of value and opinion between police and prosecutors over the propriety and effectiveness of enforcing those laws. Contrary to those who believe that police and prosecutors should strive for philosophical unity with regard to these and other matters, we believe these inconsistencies in enforcement policy are not necessarily undesirable when they involve criminal laws whose desirability is questioned by substantial and reasonable segments of the public. Rather, these inconsistent policies seem to represent a viable compromise between the incompatible public interests of having the criminal justice system "do something" but not do too much about these controversial matters.

(4) To some extent, the police complaint about non- or underprosecution of crimes represents an inverted questioning of

their own arrest policies. If too many cases are being summarily dropped out of the system and resources are not available to increase the system's capacity, then a partial solution to the problem is to reduce the number of arrest.

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PART I

BACKGROUND AND

PERCEIVED PROBLEMS

Chapter 1, AN INTRODUCTION

A. Background

This project had three major goals: (1) to describe the relationship between police and prosecutors in jurisdictions with populations over 100,000; (2) to identify the main conflicts, weak points, and perceived problems in that relationship; and (3) to analyze the causes of and potential remedies for as well as the desirability of resolving such problems.

The need for a systematic analysis of the police-prosecutor relationship has been apparent since the work of the crime commissions of the 1920's when it was reported that "[t]he country over there is frequent and characteristic want of cooperation between the investigating and prosecuting agencies in the same locality. A prosecutor may work with the police or not, and vice versa. Many examples have been found of these public agencies at cross-purposes or at times even actively thwarting one another, with no common head to put an end to such unseemly and wasteful proceedings" (U.S. National Commission on Law Observance and Enforcement, 1931:17).

The importance of the police-prosecutor relationship was further underscored by the pioneering statistical studies of those commissions that documented the high rate of case attrition from the criminal justice process. The commissions discovered that the American administration of justice is not a system of justice by trial. Rather, the majority of cases are disposed of

in administrative settings by decisions of police, prosecutors, lower court judges and grand juries in the course of rejecting, dismissing, and plea bargaining cases. This discovery led them to call for a restructuring of the police-prosecutor relationship especially in regard to the initial screening process. The Cleveland Crime Survey (1922:209) recommended that the practice of having police-prosecutors do the initial charging in cases should be eliminated; that the county prosecutor should take charge of all state cases, both felonies and misdemeanors, prior to their being initially filed in court; and that the charging standard should be something higher than probable cause. A decade later after many additional studies the National Commission on Law Observance and Enforcement (1931:20) agreed that because of "the slipshod way which cases are initiated by the police or other investigating agency and the tendency to arrest first, and find the case, if at all, afterwards," there was a need for case assessment at the earliest possible point in the process. But the Commission decided to wait for further research before endorsing the idea that the prosecutor should be in charge of that screening process.

Four decades later there was no longer any doubt. The American Bar Association (1970:84) and the President's Commission on Law Enforcement and Administration of Justice (1967a:5) both endorsed the view that prosecutors should assume complete responsibility for the initial charging process. Moreover, the President's Commission went on to recommend that as many cases as possible should be eliminated from the criminal justice system as early as possible without sacrificing the proper administration of justice.

Questions about the extent to which these recommendations have been met, whether they are even feasible, and how police and prosecutors have responded to attempts to implement them in their jurisdictions have not been systematically addressed until the present study. In addition, several other issues related to the relationship between police and prosecutors contributed to the need for the present study. The complaint about the insufficient cooperation between criminal justice agencies has continued to be identified as a serious problem (Freed, 1969). Questions about the cause of the conflict between police and prosecutors have been raised but not settled (Reiss and Bordua, 1967; Neubauer, 1947b). New studies relating to the attrition of cases from the justice process have offered various explanations for that attrition all of which were directly related to the interconnected work of police and prosecutors. One study suggests that case attrition may be due in part to the failure of the police to obtain the correct names and addresses of witnesses (Cannavale and Falcon, 1976). Another suggests it may be due more generally to the amount of information supplied in police reports which in turn seems to be a function of what the prosecutor demanded of the local police (Petersilia, 1976). A third study suggests that it was due to substantial differences among police in their ability or willingness to make cases as strong and trialworthy as prosecutors need them (Forst, et al., 1977). Yet another study suggests that at least for the crime of

rape the high rate of cases not resulting in conviction may be due to the poor quality of work on the part of both police and prosecutors (Battelle Memorial Institute, 1977a and 1977b). Meanwhile, other groups noting the inconsistencies in enforcement policies between police and prosecutors generally as well as specifically in regard to gambling were calling for their elimination and for the establishment of philosophical harmony between these two agencies (National Advisory Committee on Criminal Justice Standards and Goals, 1976; and Fowler, et al., 1977, respectively).

Although the above and other issues had been known for years, there had been few attempts to organize them into a systematic assessment of the police-prosecutor relationship. Consequently, the National Institute of Law Enforcement and Criminal Justice (1977) issued a solicitation for research that called for an exploratory review of the area of police-prosecutor relations. The study specifically called for identifying and discussing the nature of the interdependent relationships between these two agencies; the nature and causes of problems in that relationship; and possible methods of resolving or minimizing these problems.

Accordingly, this study is an exploratory/descriptive analysis of this topic. As such it has the goal of all exploratory research which Sellitz, et al. (1976:90) describe as seeking to "gain familiarity with the phenomenon or achieve new insights into it, in order to formulate a more precise research problem or to develop hypotheses." The study was deliberately

given a broad scope. It was thought as a formulative work that would not only generate new information but also synthesize the relevant existing literature; answer some questions; reformulate others; provide a conceptual framework that would raise the discussion to a more general level so that relevant literature from outside the criminal justice field could be brought to bear on the problem; and, finally, to provide an evaluative framework that would allow policy makers to better understand the main trade-offs in organizing the police-prosecutor relationship to achieve the maximum feasible quality of the administration of justice. The conceptual framework is that of organizational theory with special emphasis on communications theory. The evaluative framework consists of a "model" arrangement of the criminal justice process that identifies the main trade-offs in organizing the process to achieve a high quality of justice.

B. Scope of the Study

> "Defining the police-prosecutor relationship is not simple"
>
> --Donald McIntyre (1975:201)

The scope of this study is determined by the definitions of the three key terms: police, prosecutors and relationship. The police agencies covered are those dealing with violations of state law (including city and suburban police departments, sheriffs' departments and to a limited extent, state police). Not included are private police, federal police and other special purpose police agencies without a substantial responsibility for dealing with common, street crime. The size of the police departments studied varies from 50 to 24,000 officers; but only

departments which are located within a prosecutor's jurisdiction with a population of over 100,000 are included.[1]

There are various kinds of government agencies with prosecutorial powers, but this study focuses only on those which have the primary responsibility for the prosecution of felony and/or misdemeanor offenses in jurisdictions of over 100,000 population. Not included are federal prosecutors, special state prosecutors, local prosecutors with jurisdictions solely of petty violations or ordinance violations, private prosecutions by citizen prosecutors, medical examiners or other governmental officials with special prosecutorial powers.[2]

The term "relationship" is used in this report in its broadest sense. It includes all the ways in which police and prosecutor agencies interact or interlink including not just face-to-face interactions between individuals but also the indirect and impersonal interactions between organizations (such as the flow of paperwork) including the general influence of one agency's policies and practices on those of the other. The study

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1 This restriction was placed on the study by the National Institute of Justice.

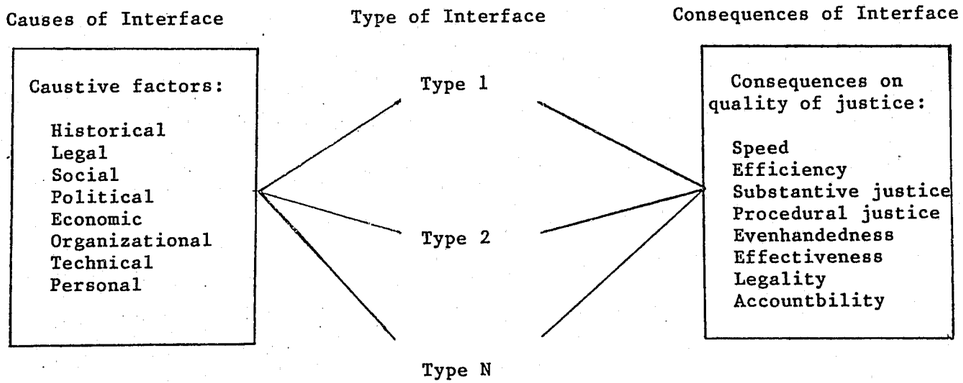
2 There is reason to believe that the police prosecutor relationships in the federal system and in rural areas in the state systems differ in important ways from what is described here. In rural areas prosecutors play a larger role in the investigative process (La Fave, 1965). In the federal system the federal police agencies are concerned with providing prosecutors with convictable cases according to Eisenstein (1978) whereas we found that local police agencies are more oriented to arrest than conviction, (see Chapters 2 and 3).

is not limited to an analysis of the relationship between the chief of police and the chief prosecutor . It is much broader. As McIntyre (1975) notes it is not easy to define this relationship.

Solely for purposes of providing a simplified illustration of the kinds of variables and relationships under examination in this study, we will discuss this global concept of the police-prosecutor relationship as if it could be treated as a dependent variable to be explained by other variables and also an independent variables to be used, in turn, to explain still other dependent variables. This is illustrated in Figure 1.1 below. It is a complex whole with many subdivisions each of which is worth examining by itself (such as the relationship between the police and prosecutors in regard to the investigative function; or in regard to their respective responsibilities at bail, charging, plea bargaining, trial, or sentencing; or with regard to their respective training programs).

Figure 1.1

GENERAL MODEL OF THE CAUSES AND CONSEQUENCES OF DIFFERENT TYPES OF POLICE-PROSECUTOR INTERFACE



In the left-hand column are the types of variables which have produced variations in the police-prosecutor relationship (or more correctly, of the components of the relationship). The middle column is intended to suggest that the relationship itself varies. Finally, the right-hand column illustrates the types of variables that are affected by alternative arrangements of the interface.

To illustrate, one independent variable which shapes the structure of the charging process in a jurisdiction is the law. In some states, for example, Michigan, the law requires the police to obtain the permission of the prosecutor before the case is initially charged. This factor shapes the nature of the police-prosecutor interface in connection with the initial charging decision and will also have implications for the speed, efficiency, effectiveness, evenhandedness, and justice of that part of the administration of justice. That is, requiring the police to have the permission of the prosecutor before the case is initially charged may in effect create substantial expense not only to the police but also to other people in the system such as the defendant (who may be waiting in jail while the police seek out the prosecutor).

An analysis of the impact of any one of the "causes" listed in Figure 1.1 on the local police-prosecutor relationship and, in turn, impact on variations in the relationship on the "consequences" listed would be a major study in itself. To repeat such analysis for each of the components of the relationship would far exceed the resources of this project. The

general schema of Figure 1.1 is intended as a heuristic device and guidepost for the kinds of issues that need to be explored. One of the immediate uses of this figure is to make clear the potential trade-offs that are involved in alternative arrangements of the police-prosecutor relationship. That is, in examining the "outcome" variables (the right hand column) it should be noted that there is a potential conflict among them. That is, while they are all desirable outcomes they are potentially in conflict with each other. As Packer (1968) has so clearly shown speed and efficiency are antagonistic to some aspects of legality and procedrual justice. Similarly, Schur (1968) has shown the antagonism between substantive and procedural justice.

It was not possible within the scope of this project to obtain "hard" quantitative measures of each of the variables in Figure 1.1. However it was possible to make judgments about the relative value of particular police-prosecutor arrangements with respect to the causes and consequences of those arrangements. It was also possible to discuss the trade-offs between the outcome variables in these alternative arrangements. Several parts of the analysis are cast not in terms of the "best" arrangement among police and prosecutor agencies but rather in terms of their relative advantages and disadvantages with respect to these outcome variable.

C. Conceptualizing the Problem

The police-prosecutor relationship cannot be understood in a conceptual vacuum nor can the merits of alternative arrangements

of that relationship be appreciated without comparison to some standard. This study has found it useful to to employ the conceptual frameworks of the theory of large scale social organizations as well as communications theory. It also has developed a model of the main trade-offs involved in alternative methods of organizing the criminal justice system.

Police and prosecutor agencies are analyzed as social organizations which share the characteristics of all bureaucracies. Each is a collectivity with relatively identifiable boundaries, a system of rules, authority ranks, a communication system; and each exists on a relatively continuous basis in an environment and engages in activities some part of which are related to achieving some goal or set of goals (Hall, 1972:9). Particularly relevant to the present study is the literature on interorganizational relations (Evan, 1976). Police and prosecutor agencies are seen as part of a network of organizations that constitute an "industry" that consists of interdependent organizations arranged in a serially interlinked fashion such that the output of one organization becomes the input to the next. The interorganizational perspective does not alter the basic topics of interest in the analysis. But it does highlight certain issues such as problems that occur at the boundaries of each organization; the potential for conflicting goals; and the special difficulty of coordinating efforts when there is no central authority over the component parts of the network.

Organizational theorists (Thompson, 1967; Hall, 1972) have

found that one variable of considerable importance in understanding the actions of complex organizations is the core technology employed by the organization. That consists of the set of activities and related knowledge and skills used by the organization to achieve its ends. A basic distinction in the types of core technologies that exist is between "people processing" technologies (such as used by hospitals and schools) and "object processing" technologies (such as oil refineries). In the course of examining the police-prosecutor relationship for the underlying core technology involved we arrived at what we regard as one of the major "findings" of the study. The criminal justice process must be understood as a communication system in which the core technology is the collection, storage, transmittal, and analysis of information for the purpose of making decisions. The criminal justice industry as a whole employs both people processing and object processing technologies. But the investigative, adjudicative, and sentencing processes are best understood as object processing technologies wherein the object is information. More specifically, while some part of the work of police involves people processing virtually none of the work of prosecutors does. Moreover, the basic linkage between the activities of police and prosecutors is that of information processing and decision making. In general, the form of the relationship between police and prosecutors is that the police are responsible for compiling information and prosecutors are responsible for deciding how to dispose of cases based on that information.

Certainly this is not the first study to conceive of the criminal justice process as an information processing and decision making system (see, e.g. Daudistel, Sanders and Luckenbill, 1979; Gottfredson and Gottfredson, 1980; and Skolnick and Woodworth, 1967); nor is it the first to refer to the justice process as a "communication system" (Blumberg, 1967:39). But a systematic application of the concepts of communications theory to the criminal justice process has not been done and existing conceptualizations are inadequate.

One sometimes hears the information processing activities of police and prosecutors described in terms of an analogy of a case folder being originated by the police and passed on to the prosecutor like a baton in a relay race (Graham and Letwin, 1971). This image does help make two important points: (1) it is the case folder not the defendant that is being processed from arrest to final disposition; and (2) the backbone of the core technology of the criminal justice system is a documentary, paper-records system. But, the analogy does not adequately convey the complexity involved. It does not show that as the folder moves forward additional reports are added, or that the prosecutor can be an information gatherer not just a receiver of the baton; nor is it conceptually rich enough to account for why information does not get passed on.

In contrast, communication theory can more fully account for these problems. This theory was originally developed in the field of electronic telecommunications, but, social scientists have found it useful for understanding communication between

human beings and social organizations whether or not electronic telecommunications hardware is involved (see, e.g., Katz and Kahn, 1966; and Cherry, 1961). When systematically applied to the criminal justice process and specifically to the police-prosecutor relationship communications theory organizes into a coherent whole and makes sense of many seemingly disparate, unrelated and even trivial incidents. It focuses attention on a fundamental process and leaves open the matter of which agencies of justice operate that process and how it is arranged. Unlike the traditional criminal justice literature it focuses on the underlying unity of purpose rather than the bewildering fragmentation at the surface. This is particularly valuable for cross-jurisdictional research because it provides a basis for assessing the relevance of the wide variation in the social organization of justice.

In assessing the relative benefits of the alternative arrangements of the police-prosecutor relationship it is helpful to have some model of what a "good" arrangement might be. A working model can be constructed by deriving criteria from three major constraints on the administration of justice in America. Given the democratic ideals of the country the model arrangement must provide for accountability of the system to the public; given the jurisprudential ideals the model must assure that the process be just, fair, according to law. And, given the organizational imperatives the model must assure the efficient and effective administration of justice. Based on these considerations and the view of the criminal justice process as a

communication process, a model arrangement of the police-prosecutor relationship (and, more generally, of the criminal justice process) would be one which gets the best (most complete and reliable) information to the relevant decision maker by the quickest, lest expensive, most reliable, lawful route under conditions which allow for accountability and provide for continual feedback for self-correction and evaluation.

Using this model alternative arrangements of the police and prosecutor relationship will be ranked in order of general desirability. However, this analysis must be regarded as a first effort perhaps more useful as a heuristic device than as a definitive ranking of the relative benefits of the systems described.

D. Methodology

Because of the exploratory, formulative nature of this study as well as the imposed requirement that a large number of jurisdictions be visited, the primary source of information for this study are the semi-structured interviews with 205 law enforcement officers and 85 prosecutors in 16 purposefully selected jurisdictions. The jurisdictions were selected so as to achieve substantive rather than numerical representativeness. That is, the principle of selection was not to find the "typical" jurisdiction but rather to maximize relevant differences among jurisdictions so that many different arrangements of and problems in the police-prosecutor relationship could be observed. This was done by first identifying from the literature and from early discussions with police and prosecutors factors which appeared to

significantly shape the police-prosecutor relationship. Then a file was established on 128 jurisdictions indicating the presence of the above factors. This file was based on information from several sources including the computerized files of the Law Enforcement Assistance Administration, a nationally distributed call for information, requests at three professional gatherings of police and prosecutors, and a grapevine technique using our consultants. Jurisdictions were then chosen from this file.

Within each jurisdiction both police and prosecutors were interviewed; and within each type of agency people from several different levels of the organization were interviewed including the executive, middle command and line levels. Furthermore, within each jurisdiction two law enforcement agencies were visited. One was always the largest agency in the jurisdiction. The other was either a medium or small size agency. Also, a total of 8 defense attorneys were interviewed. In addition, there were five other sources of data used.

(1) A 16-item telephone interview was conducted with the felony prosecutor's office and the major law enforcement agency in a stratified random sample of 10% of jurisdictions with populations of over 100,000. This survey was designed to determine how representative certain views and practices relevant to the police-prosecutor relationship are. The respondents to the telephone survey were usually senior level representatives of their agencies.

(2) Three panel discussions of the problems in police-prosecutor relationships were held between project staff

and groups of police and prosecutors. The first was with a group of more than 40 command-level police officers attending a briefing conference in connection with the Integrated Criminal Apprehension Program. The second was with a group of 28 chiefs of police from major metropolitan departments attending the National Executive Institute of the FBI Training Academy. The third was with a group of a dozen supervisory-level prosecutors who attended the special session on police-prosecutor relations conducted by the project at the Mid-Winter meeting of the National District Attorneys Association. Each of these discussions was open-ended and attempted to get the participants to identify both the main problems in the relationship and the causes of those problems. In addition to the discussions, self-completing questionnaires were distributed at each of these three meetings and respondents were asked to identify the major problems as they saw them.

(3) Secondary analyses of structured interview data as well as case information data on about 3,000 robbery and burglary cases from six jurisdictions obtained in a previous study of plea bargaining were done.

(4) An 18-item semi-structured interview was conducted with a nonprobability sample of 15 defendants serving less than five year sentences in a county house of corrections.

(5) A decision simulation was administered to an adventitious sample of 62 police officers. Their decisions regarding how a hypothetical armed robbery case should be disposed of and on the basis of what information were compared

with a sample of 138 prosecutors (whose responses had been obtained in a previous study of plea bargaining [McDonald, et al., 1979]). This substudy had two purposes. One was to test the hypothesis that police may not realize how much information prosecutors feel they need to make decisions. The other was to determine whether police and prosecutors would in fact differ over disposition decisions if they were dealing with exactly the same case.

The police officers who participated in this decision simulation were obtained primarily from officers attending the 1979 Annual Meeting of the International Association of Chiefs of Police, Dallas, Texas, together with some officers from the Washington metropolitan area. Fifty-five percent of the sample were police administrators; 35% were investigators; and only 3% were patrol officers. The prosecutors' responses used in the comparison came from two sources. Fifty-three percent of the prosecutors were recruited from six jurisdictions (Norfolk, Virginia; Seattle, Wshington; Tucson, Arizona; New Orleans, Louisiana; Delaware County, Pennsylvania; and El Paso, Texas). The balance came from other jurisdictions around the country (e.g., Dade County, Florida; Multnomah County, Oregon) as well as from prosecutors attending annual meetings of professional associations.

These samples cannot be taken to be representative of any known population of police or prosecutors. The sample of police is weighted heavily by more senior police officers and ones who have the kind of career commitment that involves attending the

annual meeting of the International Association of Chiefs of Police. It is not clear what significance either of these two factors have for interpreting the data. With regard to the sample of prosecutors it, too, cannot be regarded as representative of any known population of prosecutors. however, it is not as heavily weighted with senior or upper-level command prosecutors as is the police sample.

E. Literature Review

> Traditionally, little attention has been directed toward analyzing relationships between criminal justice agencies (Morris-Doran, 1980:225)
>
> Unfortunately, the relationships between the principal organizations in criminal justice rarely have been studied. In particular, the relationship between the police and prosecutor seldom has been scrutinized, although the nature of this working relationship is a crucial consideration (McIntyre, 1975:202)

There is no better indication of the extent to which the present study had to be an explortory/formulative one than the fact that there exists little literature on this topic. With a few notable exceptions there is almost no works having as their primary focus the relationship between the police and prosecutors. What is more, the subject is either not dealt with at all or only cursorily in works where one might expect to find it treated in some depth (see, e.g., Adams, 1973; Banton, 1964; Folley, 1976; Fosdick, 1969; Leonard, 1951; Munro, 1974; Rossum, 1978; Ruchelman, 1973; Schultz, 1964; Skoler, 1977; Smith, 1940; Weston and Wells, 1972; Wilson, 1963; Wright and Marlow, 1970).

The general lack of literature on the relationship between the police and other agencies of justice (especially the

prosecutor) is all the more striking when contrasted with the extensive literature on the relationship between the police and the general community (see e.g., Radelet, 1973; and Schrag, 1971) The literature that does exist is of three kinds: a few studies directly on point (e.g., McIntyre, 1975; Morris-Doran, 1980; Littrell, 1979; Stanko, 1977; and Daudistel, 1976); a larger number of studies that deal with the topic in some limited way (e.g., Reiss, 1967; LaFave, 1965; Clarke, 1966; and Jacoby, 1980a); and a vast number of works dealing with numerous issues that have some bearing on the police-prosecutor relationship (e.g., Alschuler, 1968; Miller, 1969; and Vera Institute of Justice, 1977). Our review at this point will briefly summarize the more relevant literature. A more detailed discussion of these works is given later in connection with specific issues.

The literature relating to the police-prosecutor relationship shows that while there is some consistency among writers there is also substantial inconsistency. The police and prosecutors have been described as sharing common goals (Neubauer, 1979; Manning, 1971); and, given these common goals, it has been proposed that problems between these two agencies can largely be resolved by increasing communication between them (Milner, 1971; McIntyre, 1975; Police Chief Executive Committee of IACP, 1976). Yet the police and prosecutors have also been described as having conflicting goals (Feeley and Lazerson, 1980; Stanko, 1979) and conflicting perspectives (Milner, 1971; Neubauer, 1979; Skolnick, 1966; Rossum, 1978; Coleman, 1972; LaFave, 1965); and given these conflicts, it has been argued that

increased communication between the police and prosecutors may result in increased tension and conflict between them (Neubauer, 1979).

It has been noted that the police and prosecutors share the same frustrations when a case is acquitted or dismissed and their relationship is harmonious in many respects (Coleman, 1972; McIntyre, 1975). However, it has also been noted that by dividing responsibilities for law enforcement between the police and prosecutors conflict between them is developed and nurtured (Rossum, 2978; Reiss & Bordua, 1967; McIntyre, 1975; Cawley, et al., 1978). It has been reported that law enforcement standards employed by the police conflict with those of prosecutors in such matters as not prosecuting persons who are either not convictable or whose conviction would not be in the best interest of the community (Miller, 1969). It has been reported that social structural factors and personal factors influence the amount of conflict and cooperation between the police and prosecutors (Jacoby, 1980; Reiss and Bordua, 1967; and Coleman, 1972). Moreover, it has been found that the nature of the criminal event, for instance, whether it is rape (Brodyaga, et al., 1975; Battelle Memorial Institute, 1977), or gambling (National Commission on the Review of the National Policy Toward Gmbling, 1976; and Fowler, et al., 1977), affects the quality of the police-prosecutor relationship and the amount of conflict within it.

Chapter 2

PROBLEMS IN THE POLICE-PROSECUTOR RELATIONSHIP

A. A Panoply Of Issues

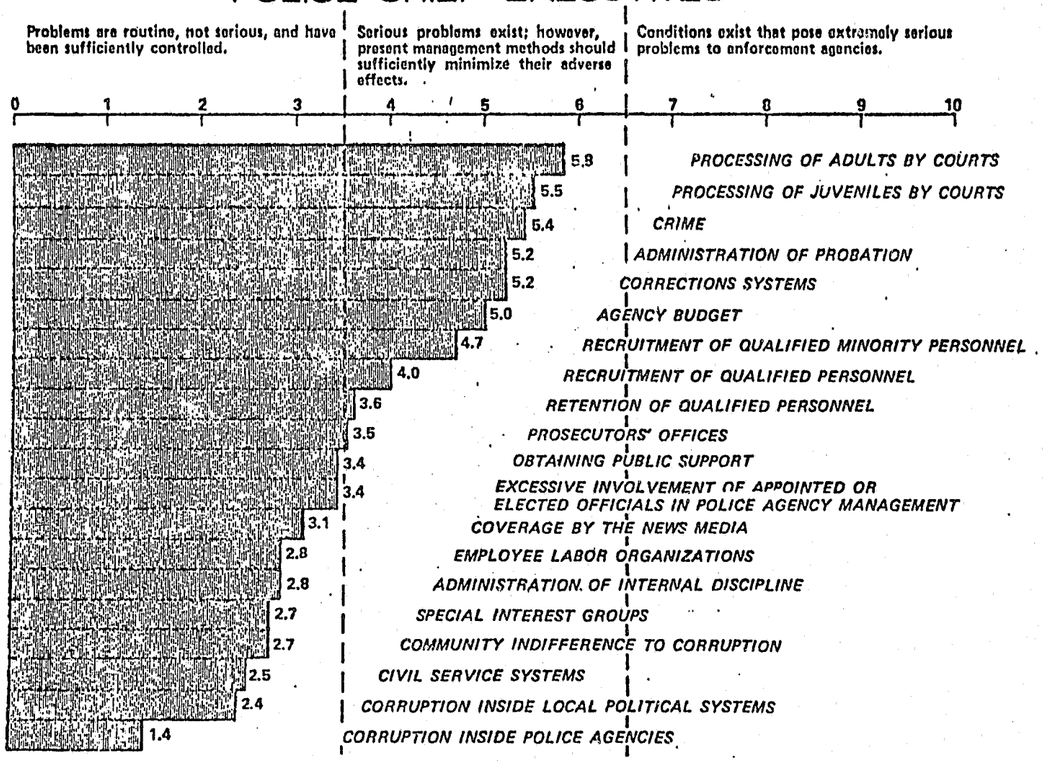
A catalogue of the problems in the police-prosecutor relationship would be lengthy. In addition to what was already mentioned in Chapter 1, several other problems (or issues that can give rise to problems) have been reported. Conflict in interpersonal relationships between police and prosecutors at the operational level, especially in the course of the charging process but also when serving on joint police-prosecutor investigative teams, has been reported by several authors (Stanko, 1977 and 1980; Neubauer, 1976; Mitner, 1971; Rossum, 1978; and Blakey, et al., 1978). This conflict is strong enough to occasionally erupt into shouting matches, fistfights, and tire slashings. Researchers have suggested that police and prosecutors have different operational goals (Feeley and Lazerson, 1980; Reiss and Bordua, 1967; Milner, 1971; Skolnick, 1966; Coleman, 1972; and LaFave, 1965); and some have implied that those differences cause frustration which in turn accounts in part for the interpersonal conflict (Stanko, 1980; and Neubauer, 1974b). Other differences between police and prosecutors have been identified as factors which do or may make the partnership between them uneasy, conflicted and inefficient are: differences in social and educational backgrounds (Skolnick, 1966; Neubauer, 1974b; McIntyre, 1975); differences in personal values (Clark, 1966); differences in their definitions

of what each other's role in the justice system is and how the two agencies should relate to each other (McIntyre, 1975); differences in the appreciation of the legitimacy and necessity of the rule of law (Milner, 1971; Neubauer, 1974b); and incompatibilities at the organizational level of specific policies (Jacoby, 1980a; Fowler, et al., 1977; and National Advisory Committee on Criminal Justice Standards and Goals, 1976). Several studies have reported police dissatisfaction with prosecutors over the latter's disposition practices and policies, in particular their decisions not to charge cases and their practice of plea bargaining (Arcuri, 1973 and 1977; McIntyre, 1975; Neubauer, 1974a and 1974b; Stanko, 1977 and 1980).

Two studies worth reporting in detail are particularly valuable for their insights into the extent to which problems bearing on the police-prosecutor relationship are perceived to exist by the police and what the cause of the problems are.[3] The Police Executive Committee of the International Association of Chiefs of Police (National Advisory Commission on Standards and Goals, 1976) found in a survey of 1600 police chief executives that "prosecutor's offices" ranked tenth in a list of twenty things which were identified as the most serious problems confronting police chief executives (see Figure 2.1) At the top of the list were "processing of adults by courts" and "processing of juveniles by courts." These latter two categories probably

3 No comparable studies from the prosector's perspective exist (but see our findings infra).

Figure 2.1



Police chief executives were asked to rate the severity of problems confronting them on a scale of zero to 10. Problems associated with the criminal justice system and crime received the highest percentages of positive responses.

Source: National Advisory Committee on Criminal Justice Standards and Goals, Police Chief Executive, p. 96.

represent indirect concern about prosecutors because responsibility for "the processing of cases" is largely the prosecutor's. However, as Reiss (1967) found, the police tend to hold the judges more responsible than prosecutors for things the police dislike about the system of justice.

Reiss' (1967:101) survey of 204 police officers in three cities regarding their assessments of law enforcement problems provides greater detail about the police perceptions of judges, laws and prosecutors. The majority of the police perceived the criminal court, municipal court and juvenile court judges as too lenient in their sentencing or exercising inadequate judgment. Virtually none of the police (7%) felt there were laws which were too harsh but half (48%) of them regarded certain laws as too lenient.

About one half (55%) of the police perceived prosecutors as doing a very good or pretty good job and two-thirds feel that the prosecutor usually handles cases as he should (see Table 2.1). (However, there are substantial differences among the three cities and by race in these perceptions.) Particularly interesting are the positive and negative police perceptions of the reasons for prosecutorial actions. The negative evaluations stress the prosecutor's lack of experience which is related to the high job turnover rate among prosecutors, charge reduction, and insufficient time in preparing cases. The positive evaluations stress that the prosecutors are doing the "best they can" with their limited experience and that they were cooperative with the police. Further inquires found that the police were

Table 2.1

Per Cent Distribution of How Police Officers Perceive the Job Being Done by Public Prosecutor's Office for Three Cities and by Race of Officer.

Public Prosecutor's Behavior	All Officers	City			Race of Officer	
		Boston	Chicago	D.C.	White	Negro
Kind of job public prosecutor is doing:						
Very good	21	32	38	11	23	14
Pretty good	34	54	32	24	34	31
Fair	30	4	12	49	29	36
Not good	7	--	3	13	7	8
Can't say	8	10	15	3	7	11
Reasons for doing kind of job (done):						
Negative evaluations:	36	2	12	57	35	42
Men are too inexperienced/ leave too quickly	(17)	(--)	(12)	(25)	(17)	(17)
Reduce charges for convictions	(11)	(2)	(--)	(20)	(12)	(8)
Nolle prosse too easily	(4)	(--)	(--)	(8)	(4)	(6)
Other negative evaluation	(4)	(6)	(--)	(4)	(2)	(11)
Positive evaluations:	52	74	74	34	54	44
Cooperative with police	(9)	(12)	(21)	(4)	(9)	(11)
Capable/do best they can	(43)	(62)	(53)	(30)	(45)	(31)
Can't say	12	24	15	9	11	14
Does public prosecutor usually handle the cases you present in the way that he should?						
Yes	66	80	76	55	69	56
Reasons for handling them as he does:						
Negative evaluations:	22	2	12	35	21	32
Reduces charges to get convictions	(8)	(--)	(--)	(16)	(9)	(6)
Gives them too little attention	(6)	(2)	(6)	(9)	(6)	(6)
All right after he reduces charge	(3)	(--)	(--)	(4)	(3)	(3)
Does best he can given leniency of courts	(2)	(--)	(--)	(3)	(2)	(6)
Other negative evaluation	(3)	(--)	(6)	(3)	(1)	(11)
Positive evaluations:	53	68	67	40	55	41
Cooperative with police	(30)	(40)	(32)	(22)	(32)	(19)
Best they can with experience they have	(23)	(28)	(35)	(18)	(23)	(22)
Can't say	25	30	21	25	24	27

Table 2.1 (continued)

Per Cent Distribution of How Police Officers Perceive the Job Being Done by Public Prosecutor's Office for Three Cities and by Race of Officer. (Continued)

Public Prosecutor's Behavior	All Officers	City			Race of Officer	
		Boston	Chicago	D.C.	White	Negro
Do you think the public prosecutor generally is more interested in winning a case in court or more interested in justice?						
Winning a case	33	18	50	36	33	33
Both	3	8	3	1	4	--
Justice	44	52	35	41	41	58
Hard to say	20	22	12	3	22	9
Why do you feel that way (about what he does)?						
He wants to use it to get ahead/for prestige	10	8	24	7	10	11
He wants to win	10	4	15	10	11	3
Not personally involved/just a job	14	22	15	11	15	5
He takes an oath of justice	8	10	3	7	9	8
Careful about evidence	7	8	6	9	6	14
All other	11	6	6	15	9	19
Can't really say	40	42	32	42	40	39
Can relationship between police and prosecutor be improved?						
Yes	39	12	44	49	39	39
In what ways (can it be improved)?						
Not change prosecutors on cases	4	2	--	4	4	6
Should investigate more	6	--	9	8	6	6
Should not reduce charges as often	3	--	--	4	1	8
Should know more about police work or work closer with police	21	8	20	28	22	14
Police should be trained better in law	*	2	3	--	1	--
All other	5	2	9	6	5	6
Hard to say	61	86	59	51	61	61

*0.5 per cent or less

split in their views as to whether he is motivated by the noble purpose of doing justice (44%) or the less laudable goal of just winning the case (33%). A substantial proportion (39%) felt that the police-prosecutor relationship could be improved; but the majority (61%) could not say how. The one suggestion made with any frequency (21%) was that prosecutors should get to know more about police work or work closer with police.

B. Perceptions of Police and Prosecutors

We sought insights into the police-prosecutor relationship by asking both police and prosecutors two questions. First each group was asked what the trouble with the other was as far as they (the first group) were concerned. Then each group was asked to estimate what the other group would say about them (the first group).[4]

1. Police Complaints About Prosecutors

a. Lenient/Inappropriate Dispositons

The main complaint police have against prosecutors has to do with dissatisfaction with one or another aspect of the pattern of case dispositions (see Table 2.2). The specific nature of the complaint varies. Sometimes it focuses on the charging decision; sometimes on plea bargaining or dismissal. Sometimes it is that the rates of these adverse decisions are too high; sometimes that

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4 The questions were open-ended and more than one answer was accepted. These responses are presented in a way which tries to quantify them in order to indicate the frequency of the main themes but also keep the responses as close to the original as possible in order to convey the differences in issuance and implication.

Table 2.2
POLICE RESPONSES TO THE QUESTION, "AS FAR AS THE POLICE ARE CONCERNED, THE TROUBLE WITH PROSECUTORS IS:"

Trouble Cited	Number of Respondents Citing This Trouble	Percent of all Respondents* [N = 186]
1. "Incompetent" (inexperienced) prosecutors	37	19.8
2. Do not understand police problems/realities of police work/asks for impossible/lacks "street experience"	20	10.7
3. Lack of career commitment (just using office as stepping stone, hence, less dedication	9	4.8
4. Lack of preparation for trial	29	15.5
5. Too large a caseload	12	6.4
6. Too political	20	10.7
7. Disposition policies & practices:		
(a) too concerend about good conviction record; demands "perfect" case; overly cautious	28	15.0
(b) plea bargaining		
(i.) "plea bargaining," unspecified	2	1.0
(ii.) rate of plea bargains too high	12	6.4
(iii.) reasons for or factors considered or not considered in plea bargaining not appropriate, laziness, over concern for case processing, underconcern for justice	16	8.6
(iv.) unwilling to "take a chance" at trial with selected cases which should go tro trial	2	1.0
(c) charging:		
(i.) rate of rejection too high	2	1.0
(ii.) charging standards are too high	5	1.0
(iii.) rate of early diversion too high or in inappropriate cases	4	2.1
(iv.) selected crimes not prosecuted, e.g., assault on police officer, gambling, drugs, prostitution	9	4.8
(v.) there is a gap between police and prosecutors' standard for charging	2	1.0

Trouble Cited	Number of Respondents Citing This Trouble	Percent of all Respondents* [N = 186]
(d) unwilling to "take a shot" (to charge or go to trial rather than reject or plea negotiate) in selected weak cases with important police and/or public interest at stake	3	1.6
8. Communication:		
(a) communication problems, unspecified	18	9.6
(b) do not seek/allow police input into case disposition decisions	17	9.1
(c) do not communicate case information needs in general/or, do not confer with police in preparing individual cases for trial/or office policies	9	4.8
(d) do not (refuse to) feed back, unspecified	8	4.3
(e) do not (refuse to) feed back case outcomes	4	2.1
(f) do not (refuse to) feed back reasons for case outcomes	8	4.3
(g) do not give advice on law/participate in police training	4	2.1
(h) do not accept police criticism, advice, help in court	4	2.1
9. Management policies and practices of prosecutor:		
(a) "bad management," unspecified or miscellaneous	1	0.5
(b) "too slow," various practices (arrest to trial; issuing warrants)	3	1.6
(c) too many prosecutors handle a case	4	2.1
(d) assistant prosecutors are inconsistent/arbitrary/ fickle	3	1.6
(e) case scheduling: too many cases for review; or calls more police witnesses than needed; or does not know which cases will go to trial; failure to notify when cases canelled at court	6	3.2
(f) are unavailable/inaccessible	7	3.7
(g) personnel turnover rate too high	9	4.8
(h) allows defense attorneys "to run the system"	1	0.5
(i) accountability in the prosecutor's office; police need to know who is in charge of case; need specific prosecutor contact person	3	1.6
10. Attitudes		
(a) "arrogant," "elitist," "superior" attitude toward police; has "ego" problem	8	4.3
(b) do not relate well to or no real feeling for victims/ witnesses	6	3.2

Trouble Cited	Number of Respondents Citing This Trouble	Percent of all Respondents* [N = 186]
(c) obstructionist, "can't do" vs. "can do"; too due process oriented; not aggressive enough; not interested in prosecuting	12	6.4
(d) not interested enough in assuring appropriate/severe sentence; too lenient	8	4.3
(e) not supportive of police/anti-police/do not trust police/don't back you up	8	4.3
(f) disregard for police and/or lay witneses' time, vacation, cost, and convenience	10	5.3
(g) prosecutors feel they can do anything; can ignore policy manuals	2	1.0
11. Miscellaneous		
(a) prosecutors have no conception of their role in the system; or do not see themselves in partnership with police	4	2.1
(b) existence of a special unit or emphasis in prosecutor's office to investigate police brutality	3	1.6
(c) lazy	4	2.1
(d) prosecution wants police to do prosecutor's work	3	1.6
(e) police take the heat for decisions/mistakes made by prosecutors	2	1.0
(f) prosecutors in investigation teams sometimes overstep their role, become investigators	2	1.0
(g) lack of adequate review of police reports	2	1.0

* Percentage do not total to 100% because some respondents cited more than one answer.

the reasons for the decisions are wrong or inappropriate. In general, the main police complaint about prosecutors is that they are too "conviction-oriented" by which the police mean that prosecutors are only willing to take very strong, winnable cases to trial and are too ready to plea bargain, dismiss or reject the rest. This complaint is often couched in terms of the leniency which it produces. However as will be shown in Chapter 3, the police demand for greater severity in dispositions cannot be taken at face value. When directed at prosecutorial decision making it masks an underlying desire for higher status and professional recognition for the police among the courthouse decision-makers.

Directly related to the complaint about being conviction-oriented is a series of other criticisms police have about prosecutors which in the minds account for this pattern of overly lenient or inappropriate case dispositions. They feel that prosecutors are just using their office as a stepping stone on a legal career and therefore lack an appropriate level of dedication to law enforcement; that prosecutors are too "political" which means that they are overly concerned with their personal and organizational "track records;" that they are afraid of offending members of the local power structure; that prosecutors are too inexperienced and lack the competence to obtain appropriate dispositions either at trial or through negotiations; that prosecutors are either too lazy or too corrupt or too overworked and therefore do not prepare for trial; and that prosecutors have an obstructionist, can't-do attitude and

use the law to find ways to prevent successful prosecutions rather than to achieve them.

b. Failures in Communication

A second major police complaint about prosecutors is about poor "communication" between the two organizations. Frequently this complaint focuses on four specific failures. One is that the police are not consulted before prosecutors make disposition decisions (especially plea bargaining decisions). Another is that prosecutors do not feed back information to the police regarding case disposition decisions and the reasons for them. The third refers to the inaccessibility of prosecutors to the police, the fact that police cannot reach prosecutors when they need them. In part this refers to the fact that so many cases are scheduled police do not get a chance to talk to the prosecutor about their individual cases. It also refers to the difference between the Monday-through-Friday, nine-to-five work schedule of prosecutors in contrast to the 24-hour a day, 7-days-a-week schedule of the police. For the police officer working the evening, midnight, or weekend shifts the prosecutor's office is closed. Thus, if he needs to discuss something with a prosecutor he cannot. He either has to leave messages--which is a burden and unreliable--or wait until he is back on the dayshift--by which time the case may have already been disposed of, the question forgotten, or the damage done.

In its more specific form this complaint about accessibility is a request for: (1) prosecutors to come to the crime scenes in important cases; (2) accessibility to the command-level

prosecutors for the purpose of appealing or criticizing the decisions or practices of line-level prosecutors; (3) the establishment of one contact person in the prosecutor's office whom the police can always call whenever they need something from the prosecutor's office and are not sure who to call to get it; and (4) related to but not synonymous with this last point, clarification as to which prosecutor is in charge of a case at various stages, especially at trial. When numerous prosecutors handle a case the police do not know either whom they should hold accountable or to whom they themselves are accountable. This situation is at its worst in prosecutors' officers which use "horizontal" ("zone defense") as opposed to "vertical" organization with one person handling the case from beginning to end; and also in offices with trial teams where several prosecutors are jointly responsible for disposing of all cases assigned to a particular courtroom.[5]

Another important variant of the failure-to-communicate complaint is that prosecutors' offices do not take an active enough role in conveying what they want the police to say or do in making arrests, charging cases or testifying at trial. Sometimes this refers to a general failure to notify the police about new policies or changes in the law or particular procedures such as warrant writing. Frequently it refers to the handling of individual cases and the failure of prosecutors to go over cases

5 Typically, each of these trial teams has a chief prosecutor in charge but this does not meet the needs of the police for clear accountability and easy access.

with police officers before trial. This complaint dovetails with the more general complaint that prosecutors do not prepare their cases for trial but rather try them "off the seat of their pants." When the case is called they have not read it at all or only skimmed it. Instead of advising the police officer as to strategy or asking for details not sufficiently covered in the police report, prosecutors ask the police to tell them what the whole case is about.

This is particularly true in misdemeanor cases but happens in felony cases as well. The police resent it for several reasons. They figure they went to the trouble of writing the report so the prosecutor should at least read it. They don't like the implication that the case was not worth preparing for; and they get bitter when a clever defense attorney makes fools of them on the witness stand or tricks them into giving damaging testimony which a little advice from the prosecutor could have avoided.

c. Inexperience/Incompetence

Another frequent category of police complaint about prosecutors refers to the "incompetence" and lack of experience of the latter. In part this complaint points to an underlying problem. Prosecutors' offices have high rates of staff turnover. Consequently, at any one time, a substantial proportion of the prosecutors are inexperienced. Police are especially aware of this because prosecutors usually start their career in the lower courts where the police have their most frequent contact with them. The police often act as instructors for these new

prosecutors, teaching them not only the general procedures in the lower court but even when to make objections and what questions to ask witnesses at trial in felony courts.

The significance of the high turnover rates is not limited to its obvious implications regarding the incompetence of prosecutors. It also inhibits the development of those informal social ties between police and prosecutors that permit the establishment of trust, goodwill and open communication. It either interferes with their establishment or cuts them short. Thus staff turnover represents a structural condition which perpetuates the illwill, mistrust and poor communication between police and prosecutors.

Not all the prosecutorial incompetence complained about by the police is due to inexperience. They have also found that prosecutors' offices house some inept attorneys. They have seen these prosecutors as well as the inexperienced ones outmaneuvered, dominated, and intimidated by defense attorneys. They believe in the courthouse folk wisdom that older prosecutors must be incompetent otherwise they would have long since left for greener pastures.

d. Don't Understand Police Problems and Realities

Another common police complaint about prosecutors is that they do not understand or appreciate police work, problems and priorities. One variant of this theme is that prosecutors do not "know the street" and are therefore naive about the real world of crime, unsympathetic towards and distrustful of police explanations of why certain things were or were not done in a

case, and less diligent and effective as prosecutors. Packed into this version of the complaint are a thousand "if-the-prosecutor-only's." If he only: (1) knew how much other work police have to do besides chasing around for more information; (2) knew how difficult it is to go by the book, or to get people to cooperate, or to get information out of people who are unintelligent, uncooperative, unconscious, hysterical, foreign, or traumatized; (3) if he only knew what it is like to be spat upon, kicked, shot at; (4) if he had only seen the sweet old man when he had been mugged, the innocent young girl when she was ravished, the hysterical woman when she was burglarized; (5) if he only knew how demoralizing it is to work hard on a case only to lose it on a technicality; (6) if he only knew how impossible it is to ask your troops to go back out there and put out maximum effort after one of those demoralizing cases is lost; (7) if he had gone above and beyond the call of duty, spent long hours lying on his stomach in a cold wet field for three days on a stake-out, then by God, he would think twice before casually rejecting that case out of hand. He would do his damnest to get something out of it; and if he did have to reject or dismiss it, he would display an appropriate amount of appreciation for the level of police effort that went into it, sympathy for the loss of it, and displeasure with the outcome. If he had any frustration or displeasure to vent it would be at the legal structure for its restrictions and not at the poor cop who acted in good faith, gave a heroic effort, and tried to stay within the law as best he understood it with his limited training.

If prosecutors had a feel for the street, for instance, they would be less likely to assume that the cooperation of the public is easily forthcoming and that the failure to get names and addresses of witnesses is necessarily an indication of police incompetence or laziness. No doubt this happens frequently but just as frequently the realities of the street account for the police failure to get the information prosecutors want. Two humorous peephole glances at that reality were provided by a patrolman in response to our questions about whether the police fail to do as much as they could to get information from witnesses. Our questions were following up the Cannavale and Falcon (1976) study which suggested that this may be one of the reasons why prosecutors are forced to reject or nol pros a substantial number of cases.

This patrolman first related an incident which illustrates the general context in which the police must. His department had created a citizen-of-the-month award in an effort to increase citizen cooperation. The award was to be given to the citizen who had been particularly helpful in some police matter during the preceding month. One month the award was to go to a teenage boy who had given the police some information. Our patrolman had been assigned to transport the teenage boy and his family to city hall where the award was to be presented. The officer knocked at the boy's home and said to someone who answered that he was there to drive Johnny downtown. The voice behind the door immediately yelled, "Johnny it's the cops. Run!" There was a slam at the back door and Johnny was never seen nor heard from

again.

The officer's second response to our question focused more narrowly on the interaction between police and potential witnesses on the street. He gave a hypothetical dialogue which he claims is typical of what the police in certain areas of the city (those areas with the higher crime rates) frequently have to cope with.

Police: Say man, what's your name?

Witness: What?

Police: What's your name?

Witness: What?

Police: What's your name?

Witness: Who, me?

Police: Yeah, you. What's your name?

Witness: My name?

Police: Yeah, your name?

Witness: Tyrone.

Police: What's your last name?

Witness: What?

Police: Your last name?

Witness: Who, me?

The lack of a feel for the street among prosecutors together with a narrow understanding of the role of the police fosters cynicism and tensions. Prosecutors conclude the police are not doing their job right. Police officers conclude that prosecutors make "unreasonable demands." Sometimes open hostilities erupt. In her study of police-prosecutor interactions at the initial

screening unit in a New York county, Stanko reports:

> "Just before I completed my series of observations, I witnessed a scuffle between a police officer and [a prosecutor]. Both the [prosecutor] and the police officer were loudly arguing, which then escalated into pushing and shoving. Although this incident did not result in a physical contest, the discussion ended with both parties squared off." (1979:1)[4]

> "[These police-prosecutor] confrontations illustrate incidents of antagonistic exchange during the processing of the system's data. For the police officer and the [prosecutor], the encounter in the [screening unit] is such that neither participant can know the real demands and limitations of the other's work. Thus, many incidents of conflict arise because each participant is unaccountable for and ignorant of the other's work, and, to some extent, even considers it irrelevant to his or her own work." (1979:19)

e. Ambiguity of Role

Apart from its reference to the lack of street experience the police complaints about prosecutors making unreasonable demands and not understanding police priorities also refer to a fundamental problem in the structure of the police-prosecutor relationship. The police tend to define their role in case processing as ending with arrest. To work on the case much beyond that point is regarded by the police as "doing the prosecutor's work." But, prosecutors do not see it that way. They believe it is the police responsibility to continue to investigate a case to make it as strong as possible. The differences in the definition of the police role lead to misunderstandings. A prosecutor's legitimate request for follow-up investigation may be seen as an unreasonable demand of someone too lazy to do his own work. The problem of ambiguous role definitions also arises in situations where individual police

officers and prosecutors work together. Typically the complaint here is that the prosecutor goes too far and tries to assume the role of the police officer.

f. Exigent Arrests

One particularly troublesome problem is the matter of arrests that are not "intended" for prosecution but rather arise out of the exigencies of the street. These are situations where the primary objective of the police is either to restore order to a situation or to maintain some other police objective (such as maintaining their integrity in situations where they "had" to make an arrest or would have appeared corrupt or permissive, as for example, when they accidentally find drugs on citizens whom they had not intended to arrest).

The trouble with prosecutors is that they seem not to know about these exigencies but they do "know" that police are statistics-conscious, inclined to harass, and prone to overemphasize certain crimes such as drug and sex offenses. Thus when the police bring them these cases, prosecutors often do not treat them as exigent arrests but as evidence of police incompetence, harassment, statistics-mongering or reactionary social values. This failure to understand can easily erupt into the kind of bitter exchanges described by Stanko. The "garbage" cases which the Stanko prosecutors were ridiculing the police for bringing in may have been bad cases from the prosecutor's perspective but some undoubtedly were necessary arrests from the police perspective. They had to be made in order to cope with the exigencies of the street. The problem is that many garbage

cases are not the product of street exigencies but are indeed the product of questionable police actions. Unfortunately, it is not easy for prosecutors to distinguish between them especially when the prosecutor lacks street knowledge. The situation is further compounded by the police, themselves. Having made these exigent arrests they then demand that the cases be prosecuted. They often do not recognize what Bittner (1967, 1970 and 1974) saw so clearly, namely, that the arrest is the solution. Or, if they do, they want the case prosecuted to protect them from civil suits for false arrest.

One of the more significant consequences of the lack of street experience among prosecutors is something which neither prosecutors nor the police seem to appreciate. It was brought to our attention by a staff member of the Law Enforcement Assistance Administration who had been a police officer for several years and then became a prosecutor. His fellow prosecutors who lacked his experience were unable to serve as the kind of careful check on police behavior that he was. They might suspect that a police officer had made a bad search or provoked a citizen into a fight but they could never really tell. In contrast, he knew the tricks and could read between the lines of a police report. Within a year as chief of a prosecution's intake unit, he had warned several police officers to change their tactics and managed to get a few officers who refused to change dismissed.

The other side of this coin, however, is the danger that prosecutors with as much police experience as our informant may serve as even less of a check on the police than prosecutors with

no street experience at all. Rather than making them better watchdogs on the police, street experience could compromise their impartiality and ability to say "no" to police. Some prosecutors who had worked closely with the police reported that this had happened to them.

g. Scheduling Programs

Another variant of the police complaint that prosecutors are insensitive to police problems and priorities refers to the problem of the scheduling of police appearances in court and at the prosecutor's office. The concern of police executives is that the overtime costs involved in such appearances have become astronomical and represent one of the largest items in police budgets. Police executives feel that prosecutors (and judges) do not take this factor sufficiently into account in scheduling cases or objecting to continuances. The scheduling problem is also a sore point with line officers. They do not enjoy the long (and what to them appears to be useless) waits in court; and, unless they are looking to make extra pay, they do not like having to give up vacation days to be in court.

h. Other Inappropriate Attitudes

In addition to their lack of zealousness about enforcing the law prosecutors annoy the police with their "high-handed," "aggrogant," "elitist," and "superior" attitudes. This complaint seems to stem in part from resentment generated by the differential in power and status between police and prosecutors. Prosecutors get to review police work but the reverse does not happen. Moreover, prosecutors have higher occupational prestige

than the police.

As a reviewer of police work the prosecutor is in the relationship to police of superior to that of subordinate. As such, the relationship contains the ingredients for resentment contained in all similar relationships. It is like the relationship between professor and student. In this case, however, the potential for antagonism is increased because the "professor" is usually younger than the student, has considerably less experience in the matter being discussed; and is just out of law school where exchanges between professors and students are notoriously argumentative, hard-hitting and sometimes belittling and arrogant.[6] Thus, it is not surprising to hear police smarting from these exchanges. Nor is it surprising that one of the prosecutors we questioned anticipated that the police would say the trouble with prosecutors is "the attitude of young prosecutors" (emphasis added). The demeaning quality of the subordinate relationship was conveyed by the remark of a police officer who said he realized his job was to get the evidence prosecutors need but some prosecutors "treat you like a dog ordered to go fetch their shoes."

Reiss and Bordua (1967) note that in the relationship between police and prosecutor the police experience role reversal. Normally they are in the position of authority vis-a-vis the citizen. But with prosecutors they are in the

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6 As depicted in the popular movie The Paper Chase.

subordinate role answering the questions and accounting for their actions. Under these conditions, Reiss and Bordua conclude:

> "[t]he ambivalence of the police towards both the administration of justice and its role incumbants is further exacerbated. . . . This status reversal plus the generalized lower prestige of police when taken together with the institutionalized distrust of police built into the trial process creates a situation where the police not only feel themselves blocked by the courts but perhaps, even more fundamentally, feel themselves dishonored" (1967:39).

It is not just out of concern for themselves that the police complain about prosecutorial arrogance. They say that victims and witnesses suffer such treatment as well. As one officer put it, "[prosecutors] treat us the same as citizens, that is, they treat citizens atrociously. Police officers and citizens are considered by the DA as incidental to the case."

i. Lawlessness/Inconsistency

It is also not just in interpersonal interactions that prosecutors display their "high handed" attitudes. They seem to ignore laws and even their own office policies designed to restrict their discretion. In doing so they give the impression they think they are above the law and can do anything. To the police, who operate under a paramilitary organization in which orders and rules are expected to be obeyed, the prosecutor's exercise of discretion together with the general lack of rigid rules in prosecutors' offices gives the impression (and to some extent the reality) of lawlessness. Undoubtedly this does little to reinforce the demand that police observe the rule of law, and it makes that demand seem hypocritical. When prosecutors reject, dismiss or plea bargain down a case because the "constable

blundered" and failed to observe some procedural regularity the police wonder why sauce for the goose isn't sauce for the gander. Instead of being impressed by the seriousness of the courts' commitment to the principle of legality, they are struck by the hypocrisy of a system in which they are held to rules but the lawyers (apparently) are not.

The lack of consistency in office policies and decision making of individual prosecutors not only contributes to police cynicism, it also saps their motivation and reinforces their inclination to define their role in the justice process as ending with arrest. The chief of one of the police departments in Los Angeles County put it this way. His department did not care about what happened to cases after they had been accepted for prosecution because the prosecutors were so inconsistent the police felt they could never please them.

Illustrating a novel application of the theory that the certainty of punishment is more important than the severity--even to the police--a member of the Dallas Airport police reported that at one time his Department preferred to do business with the Dallas County D.A.'s office rather than the Tarrant County D.A.'s office.[7] It was not that the sentences were more severe in Dallas but that the police never knew what to expect from the Tarrant County prosecutors. Predictability was so important to these officers that when they took a serious criminal into

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7 The Dallas Airport straddles the line that divides these two counties.

custody on the Tarrant County side of the airport they would transport him to the Dallas County side before making the formal arrest. This was to assure that the case would be prosecuteded by the Dallas D.A.

2. Prosecutors Perceptions Of Police Complaints About Them

When prosecutors were asked to anticipate what complaints the police had against them they accurately predicted most of the main complaints (see Table 2.3 and compare with Table 2.2). Most prosecutors are aware of the police displeasure with their case disposition policies, specifically that too many cases are rejected, reduced, dismissed, plea bargained and that not enough defendants go to jail. However, few seem to appreciate the extent to which police regard this to be due to prosecutorial incompetence, laziness, corruption, political expediency, and the single-minded pursuit of a good conviction record.

Many prosecutors are also aware of the police dissatisfaction with regard to the communication and coordination between them. They know that police want case feedback. They also know that the police desire to be consulted before cases are disposed of especially through plea bargaining (although some prosecutors feel the police have no business concerning themselves with these disposition decisions). Prosecutors are also aware of the police complaint about scheduling problems (although some respondents pointed out that in their jurisdictions the problem is not something within their control to do anything about). They also realize that they sometimes

Table 2.3

PROSECUTORS' RESPONSES TO THE QUESTION, "WHAT DO YOU THINK THE POLICE IN YOUR JURISDICTION WOULD SAY ARE THE THREE GREATEST SOURCES OF FRICTION OR AREAS IN NEED OF IMPROVEMENT IN THE POLICE/PROSECUTOR RELATIONSHIP?"

Troubles Cited	Number of Respondents Citing this Trouble	Percent of all Respondents* [N = 25]
1 Incompetence/inexperience		
(a) of prosecutors	2	8.0
(b) of prosecutors' investigtors	1	4.0
(c) high turnover rate among prosecutors	1	4.0
2. Case disposition policies		
(a) prosecutors are soft on crime; not enough defendants incarcerated	2	8.0
(b) too much charge reduction/rejection	8	32.0
(c) too much plea bargaining; giving away too much in plea bargaining	9	36.0
(d) not enough trials	2	8.0
(e) not enough convictions at trial	1	4.0
3. Poor communication/coordination		
(a) in general	2	8.0
(b) failure to consult with police before plea bargaining/or other disposition	3	12.0
(c) failure to feed back outcomes/reasons	6	24.0
(d) failure to help police prepare for trial	1	4.0
(e) prosecutors unavailable, not attending depositions with police	3	12.0
4. Insensitivity to police needs/problems		
(a) failure to understand realities of police work/lack of "street" experience	1	4.0
(b) scheduling problems: too many continuances; too much wasted time in court; insensitive to police vacation; tour-of-duty & overtime cost problems; not notifying police of cancelled trials	8	32.0

Troubles Cited	Number of Respondents Citing this Trouble	Percent of all Respondents* [N = 25]
5. Miscellaneous		
(a) prosecution of police officers	1	4.0
(b) too much delay from arrest to disposition	1	4.0
(c) attitude of prosecutors, unwilling to accept advice; high handedness	2	8.0
(d) asking police to do too much extra work; return to police of poorly prepared reports	2	8.0
(e) privacy problems	1	4.0
(f) prosecutors meddling in, trying to domiante investigation; blurring of roles in investigation	5	20.0

* Percent do not total to 100 because respondents gave more than one answer. The items within general groupings cannot be added.

overstep their roles when working with the police.

3. Prosecutors' Complaints About the Police

The main complaint prosecutors have about the police is that they do not provide prosecutors with the amount and kind of information (evidence) they need (see Table 2.4). Investigations and case reports are insufficient for the purposes of prosecution. They fail to "anticipate the needs of the prosecutors at trial." Prosecutors say the police are too arrest-oriented. That is, they terminate their role in a case as soon as they have probable cause and an arrest; and it is difficult to get the police to continue to investigate a case once it has been cleared by arrest and filed with the court, i.e., once they have gotten their arrest and clearance statistic out of it. Prosecutors attribute this to a lack of training in the law and in the ability to recognize usable evidence and to the lack of an institutionalized incentive structure. That is, the job of making cases trialworthy is not rewarded within the traditional police reward structure but amassing arrest statistics is.

A second, related complaint is that the police do not understand the realities of prosecution. Thus, they not only fail to bring in strong cases but do not understand why prosecutors have to reject, dismiss, and plea bargain cases. This results in unnecessary misunderstandings and conflicts.

A third common complaint is about failures in communication and coordination between police and prosecutors. This takes a variety of specific forms including complaints that the police do

Table 2.4

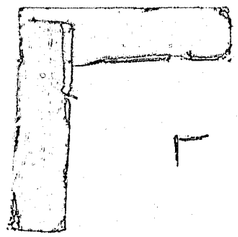
PROSECUTORS' RESPONSES TO THE QUESTION, "AS FAR AS THE PROSECUTOR IS CONCERNED, THE TROUBLE WITH POLICE IS?"

Troubles Cited	Number of Respondents Citing this Trouble	Percent of all Respondents* [N = 43]
1. Police incomptence/lack of knowledge/training/inadequate performance		
(a) in general	6	13.9
(b) lack of knowledge of the law	3	6.9
(c) poor testimony at trial	1	2.3
(d) failure to recognize usable evidence	4	9.3
(e) inadequate police reports: incomplete, inaccurate witnesses' names and addresses not adequate	11	25.5
(f) inadequate police investigations:		
(i.) in general, not thorough, not good enough to take to trial	9	20.9
(ii.) too much reliance on confession; investigation stops once confession obtained	1	2.3
(iii.) more physical evidence/fingerprints needed	2	4.6
(g) chain of custody of evidence is lost	3	6.9
(h) search warrants are improperty written	1	2.3
2. Problems in police and prosecutor roles & goals		
(a) police do not understand the realities/constraints on the prosecution/ disposition process; mistakenly think we are not on the same team or we aren't really interested in seeing justice done	5	11.6
(b) police don't understand their own role as part of prosecution system; police lack conviction-orientedness, only concerned with apprehension; they equate arrest with conviction; too arrest-oriented; terminate their responsibility for a case once it is accepted for prosection	13	30.2
(c) police are too concerned with police-oriented statistics; arrests, clearances	3	6.9
(d) police wrongly believe follow-up investigations by prosecutors investigators mean the police are not doing their job properly	1	2.3

Troubles Cited	Number of Respondents Citing this Trouble	Percent of all Respondents* [N = 43]
(e) police want to control charging and sentencing	2	4.6
(f) police want defendants to go to jail/wrongly believe if not jailed, arrest was not worth it	2	4.6
(g) police priorities are wrong/different from prosecutors'/ overemphasis on victimless/minor crimes	4	9.3
(h) the police and prosecutors' roles in individual cases get blurred, responsibilities unclear or one persons tend to do the other's job	2	4.6
3. Coordination/cooperation problems		
(a) lack of coordination between police/prosecutor, unspecified	2	4.6
(b) police unwilling to do certain work: conduct line-ups	1	2.3
(c) difficulties getting police to do further investigation after case accepted by prosecutor	7	16.2
(d) police don't ask prosecutor's advice before acting, act first then ask if it was right	1	2.3
(e) prosecutors' need a contact person in each police agency whom all prosecutors can call when various needs arise	1	2.3
(f) scheduling problems, police are not available	3	6.9
(g) high personnel turnover rates	1	2.3
(h) police internal coordination/management problems		
(i.) lack of coordination within the police department; too many cops handling a case	5	11.6
(ii.) poor quality control, consistency among branches of some departments	1	2.3
(iii.) bad management, unspecified	1	2.3
(i) police do not accept criticism from prosecutors; police are too protective of each other	2	4.6
(j) police do not warn prosecutors about weakneses in cases which police are clearly aware of	1	2.3
(k) police deliberately withhold information (because of liberal discovery rule) even from prosecutors	2	4.6
(1) pretrial conferences between police & prosecutors are needed	1	2.3

Troubles Cited	Number of Respondents Citing this Trouble	Percent of all Respondents* [N = 43]
4. Miscellaneous		
(a) police scapegoat the prosecutor and the courts to cover their own inadqequacqy	1	2.3
(b) police resources are too limited/caseloads too high	2	4.6
(c) police should be paid more for court time (only receive 2 hours "comp" time)	1	2.3
(d) problems with legality of search amd seozire	1	2.3
(e) quality of police recruits is low	2	4.6
(f) police unions are too powerful/or have fostered costly rules	1	2.3
(g) police need continual career development; on-going training	2	4.6
(h) patrolmen need more confidence	1	2.3
(i) police do not report on time when called as witnesses	1	2.3
(j) police are lazy, not concerned enough to make strong cases	4	9.3

* Percent do not total 100 because respodnents gave more than one response.



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not ask for prosecutorial advice before acting, or police fail to warn prosecutors about weaknesses in cases, or the police are not easily accessible to discuss cases, or too many police officers get involved in a case thereby unnecessarily complicating its prosecution.

One aspect of the problem of coordination which prosecutors highlighted refers to a miscellancy of small tasks and responsibilites which could be performed by either the police or the prosecutor. In this time of tight budgets, each agency is trying to get the other to assume the cost of performing these tasks including such things as the cost of conducting line-ups, transporting evidence, extraditing defendants and even the cost of xeroxing extra copies of police reports.

Prosecutors say that part of the reason why the coordination between them and the police does not improve is because the police are too defensive to discuss things they are doing wrong. Several prosecutors said they had tried to talk to the local police chief but ran into a "stone wall."

4. Police Perceptions of Prosecutors' Complaints About Them

When the police were asked to predict what complaints prosecutors had against them they too were able to accurately anticipate the major criticism (see Table 2.5 and compare with Table 2.4). Most police are aware that the prosecutors regard the quality of police work relating to the prosecution of cases as less than adequate. They know that the poor quality of police reports in particular do not satisfy prosecutors. Many also know

Table 2.5

POLICE RESPONSE TO THE QUESTION: "WHAT WOULD PROSECUTORS IN YOUR JURISDICTION SAY ARE THE GREATEST SORUCES OF FRICTION OR IN GREATEST NEED OF IMPROVEMENT REGARDING POLICE-PROSECUTOR RELATIONS?"

Troubles Cited	Number of Respondents Citing this Trouble	Percent of all Respondents* [N = 94]
1. Incompetence of police		
(a) in general, or unspecified	2	2.1
(b) lack of knowledge of law (general training)	3	3.1
(c) as witnesses at court (don't prepare; poor appearance; don't present well)	12	12.7
(d) police reports: poor quality, inaccurate, incomplete, not enough information, "weak"	38	40.4
(e) investigations: sloppy, inadequate, incomplete	21	22.3
(f) "case preparation;" inadequate, failure to provide sufficient information (e.g., witness names & addresses location of evidence); cases not prepared for conviction but only for probable cause	12	12.7
(g) reports are lost, too slow, not in proper order	7	7.4
2. Practices and policies of police		
(a) disagreement with police enforcement priorities (types of crimes emphasized; % resources on small matters)	2	2.1
(b) too many "BS," "jippy," "shaky," misdemeanor arrests; "non-cases"	8	8.5
(c) improper police practices: perjury, corruption, cover-ups, abuse of court work to get overtime pay	3	3.1
(d) lack of cooperation from police:		
(i.) in general, or specific area other than those listed	2	2.1
(ii.) police failing to appear at scheduled court hearings; not being available	8	8.5
(iii.) unwillingness to (tardiness in) do follow-up investigations, especially after casehas been accepted by prosecutor	6	6.3

Trouble Cited	Number of Respondents Citing this Trouble	Percent of all Respondents* [N = 94]
(iv.) subpoena/warrant service too slow, poor	1	1.0
(e) "overcharging" or improper charging	4	4.2
(f) police attempts to play lawyer	1	1.0
3. Attitudes		
(a) poor interpersonal relations between police & prosecutors, egotistical police	2	2.1
(b) lack of concern, enthusiasm, dedication, effort by police	4	4.2
(c) overzealousness, overkill, over concern with severe sentence, pressuring prosecutor to "take a chance" on certain cases	4	4.2
4. Roles of Police and Prosecutors:		
(a) failure of police to understand role of prosecutor, realities of & constraints on prosecutor's work	4	4.2
(b) failure of police to develop a convictability vs. a chargeability standard in case work	4	4.2
(c) failure to coordinate police/prosecutor work and see selves as being on same team	7	7.4

* The question was open-ended. Responses are not ranked by priority. If any listed issues were mentioned as any one of the three sources of friction it was scored. Consequently the percentages do not total to 100. Some responses have overlapping substantive meanings. Generally, each individual response was scored only once. But all responses to categroy 2b were also scored in 2a.

that prosecutors find police investigative work inadequate and that the police do not make cases trialworthy. They know that prosecutors are dissatisfied with police performance as witnesses in court. They are aware of the matter of police failing to appear for schedule court hearings or not being accessible; and they know of the prosecutors' perception that the police make too many weak or minor cases or "B.S." or "garbage" cases. Several police anticipated that the prosecutor would specifically complain about "overcharging" and about improper police practices (including perjury, corruption, cover-ups, and abuse of court work to get overtime pay). The police also recognize they too are guilty of overstepping their role in trying to play lawyer.

With regard to attitudes, some police thought that prosecutors would have their own version of the complaint about egotistical individuals who are hard to get along with in interpersonal relations. However this was <u>not</u> something of common concern among prosecutors. The police also anticipated that prosecutors would report the seemingly inconsistent complaints that, on the one hand, the police lack enthusiasm and dedication to making cases convictable and, on the other hand, that they are too zealous. This is indeed what prosecutors said and it is not as inconsistent as it sounds. It means that the police want convictions but do not want to do the extra work to get them.

5. <u>A Summary of Mutual Complaints</u>

In comparing the complaints of police and prosecutors about each other one is struck by some exquisite ironies. Both groups

agree that disposition decisions are not what they should be; but, the police think this is due to prosecutorial incompetence, misguided leniency, lack of zealousness and over-concern for the public relations value of good conviction records. In contrast, prosecutors say it is due to the failure of police to bring in strong cases which they believe is the result of police incompetence, lack of zealousness and motivation, and an over-concern for the public relations value of good arrest records. Both groups say their respective jobs are misunderstood by the other group and that this causes needless conflict. Both groups complain about poor communication with each other and that the other group should consult with them before making certain decisions. The ultimate irony is that when asked to predict what the other group would criticize them for, both accurately predicted most of the major complaints the other agency had against them.

Other major problems from the point of view of the police are that prosecutors: (1) are too insensitive to the scheduling costs and needs of the police; (2) are too arrogant/unpleasant in their interpersonal interactions with police and citizens; (3) are too concerned with finding reasons for non-action rather than finding legal ways to take action; (4) are too inaccessible/unavailable; (5) are too unresponsive to the police desire to be consulted in case dispositions and the police need for case feedback and training; (6) are too political; (7) are too frequently ill-prepared for trial; (8) have a tendency to overstep their role and try to dominate police investigations;

and (9) do not sufficiently trust or support the police.

From the prosecutors' perspective the other major problems with the police are that the police: (1) do not sufficiently trust or support the prosecutor; (2) have a tendency to overstep their role and try to play lawyer; (3) overemphasize petty and "victimless" crimes; (4) are too frequently ill-prepared at trial; (5) are unresponsive to the prosecutors' need for getting and passing on all the information needed to make a case trialworthy; (6) are too inaccessible/unavailable; (7) allow too many police officers to get involved in cases thereby making it more difficult to prosecute those cases successfully.

The fact that police and prosecutors realize what many of the main complaints that the other agency has against them prompts one to ask, "Why hasn't there been greater progress in solving these problems?" The answer is not simple. Some of the problems are continuing ones which will never be solved (such as the need for continual training and additional experience); others are becoming too expensive to solve in anything but a compromise fashion (such as the cost of police court appearances) Some have not been fully recognized or addressed by policy makers and textbook writers (such as the prosecutor's problems created by multiple police officers involved in a case). Finally, some which have been recognized have been understood only in part and no incentive structure has prompted either a full recognition of or an attempt to alleviate them (for example, the lack of a conviction-orientation in police work).

The balance of this report identifies additional problems

not fully perceived by police and prosecutors. It places these problems in appropriate conceptual framework; and explores more fully the causes and consequences of these problems as well as the limited solutions that have been or might be tried.

PART II

ORGANIZATIONAL ASPECTS OF

THE POLICE-PROSECUTOR RELATIONSHIP

Chapter 3, POLICE, PROSECUTORS AND CRIMINAL JUSTICE GOALS

A. The Complexity of Goals

> Organizational theorists have found it useful to assume that organizations are purposive . . . . However, it has been more difficult to actually measure the goals of an organization (Azumi and Hage, 1972:414).
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> The concept of organizational goals . . . has been unusually resistant to precise, unambiguous definition. Yet a definition of goals is necessary and unavoidable in organizational analysis (Perrow 1972:440).

Police and prosecutors often wonder whether they are "really on the same side" and have the same goals. It is not easy to answer this deceptively simple question. The criminal justice literature on point is confusing and inconsistent partly because of the ambiguity of the concept of organizational goals. The literature on large-scale organizations is a little more helpful by providing both an analytic framework for discussing types of goals as well as the substantive finding that conflicts of goals among different units of large-scale organizations is common, if not normal.

The novice assumes that if he could understand the goals of an organization he could understand the organization itself and measure its success. However, organizational theorists (Perrow, 1972; Zald, 1963) have shown things are not that simple. The ultimate goals of an organization are sometimes vague, undefinable or lack consensus. Other times they are difficult to identify. For the administration of justice these ultimate goals are at least identifiable. Often they are literally "written in stone" over the courthouse doors where phrases like "equal justice under law" appear. But, identifying these ultimate,

stone" over the courthouse doors where phrases like "equal justice under law" appear. But, identifying these ultimate, official goals is just the first step. Defining vague terms as "justice" is the problem. Even in those cases where an organization's ultimate goal appears at first glance to be clear and definable (as, for example, the profit-making goal of business organizations) it is not altogether clear how that ultimate goal should be converted into specific courses of action.[8] Knowing ultimate goals does not help make many of the day-to-day choices that organizations face.[9] Successfully resolving these choices constitutes the proximate goals of an organization. Typically the achievement of proximate goals are distributed among subunits within an organization; and often these subunits compete with each other and end in conflict.[10]

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8 Suppose a business decides to expand, running a deficit over the short-run in hopes of making a larger profit in the long-run. Is it seeking its goal or not? What if the company had stayed with its smaller but steadier and more certain profitable operation? Would it have been meeting its goal? Was the expansion decision "better," more goal-oriented, than the decision to remain the same? The point is that knowing an organization's ultimate goals does not predict or explain which alternatives it might take; nor does it give an unambiguous standard for measuring the organization's success. For instance, during the period when the first company ran the deficit, was it failing to achieve its profit-making goal?

9 Such as how the organization's core technology should be organized; how the resources should be divided among the various lesser, task-oriented goals within the organizations; who among many qualified candidates should be hired; and with which among many outside organizations should business and other ties be established.

10 For instance, a sales division seeking to maintain good service and satisfied customers may want a large inventory

(Footnote continued)

To cope with the complexity of the notion of organizational goals Perrow (1972) distinguishs five categories of goals (which are neither mutually exclusive nor exhaustive). They are: social goals (things organizations do for society in terms of fulfilling basic needs, such as maintaining order); output goals (types of output defined in consumer functions such as consumer goods or punishment of offenders); system goals (the manner of functioning of the organization, e.g., whether growth or stability is emphasized); product-characteristic goals (whether emphasis is on quality or quantity; uniformity or uniqueness); and derived goals (the uses to which an organization puts the power it generates in pursuit of other goals). Perrow's categories provide a useful approach to analyzing the goals of the criminal justice system as well as those of police and prosecutors.

B. Goals of the Criminal Justice System

The criminal justice system constitutes a major part of the legal institutions of society. The social goals of (major social functions performed by) these institutions have been identified as consisting of three "law jobs": rule creation, rule enforcement, and dispute settlement (Chambliss and Seidman, 1971). In the course of performing these law jobs the criminal justice system is also supposed to "do justice." Defining what

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10 (continued)
whereas the production division seeking to minimize its costs and the potential for lay-offs due to large inventories would want a smaller inventory.

people differ. When it comes to the goals of criminal justice in modern America, it is possible to piece together several different and conflicting goals. Some of these have to do with output goals, others with system and product-characteristic goals. As for output, there are five distinct and partially inconsistent goals: deterrence (both general and special); rehabilitation; retribution; isolation (incarceration); and restitution (reparation) (Pincoffs, 1966).[11]

Defining justice is further complicated by the fact it is not only a characteristic of the final output (wrongs righted, future crimes deterred) but also of the manner in which the output was achieved (e.g., was the defendant given due process of law). In Perrow's terms this refers to controversies over product-characteristic and system goals: how much due process of law a defendant get; how much effort should be devoted to quality rather than quantity in case processing: how should should the

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11 There is considerable controversy as to which of these goals should predominate. Currently the penological fashion is changing. After decades of the predominance of the rehabilitative ideal there is today a shift towards deterrence, retribution and restitution (see, generally, Barnett and Hagel, 1977; and Galaway and Hudson, 1978). Even during periods when one penological goal predominates that goal is not accepted equally by all criminal justice practitioners nor are individual judges consistent in the rationales they use in sentencing different cases. This inconsistency is not the same thing as inconsistency in the sentencing of "identical" defendants. Rather it occurs when a judge in his own mind justifies a sentence for one type of criminal (e.g., a vicious murderer) on the grounds that he "deserves" to be punished severely (retribution) whereas when it comes to sentencing a different type of criminal (e.g., a drug addict) the rationale for the sentence is rehabilitation (see, Hogarth, 1971).

law). In Perrow's terms this refers to controversies over product-characteristic and system goals: how much due process of law a defendant get; how much effort should be devoted to quality rather than quantity in case processing: how should should the criminal justice process be organized and operated. Packer (1968) has dichotomized the main disagreements in this controversey into two positions: the "crime control" and the "due process" models of the criminal justice process. Advocates of the crime control model emphasize the importance of speed, uniformity, informality and finality in the processing of cases. They believe that the police and prosecutors are accurate and reliable in their ability to screen out "factually innocent" defendants. They prefer to see the process run like an assembly line, quickly disposing of as many cases as possible with a reasonable degree of accuracy but also a great deal of efficiency. On the other hand, advocates of the due process model emphasize the opposite. They believe the criminal justice process should be like an obstacle course. All shortcuts should be eliminated. Defendants should be given every possible opportunity to challenge the case against them.

The crime control advocates believe that the maintenance of order in society is the most important of all the goals of the criminal justice system and that it is best achieved by operating the system as their model describes. In contrast, the advocates of the due process model agree that maintaining order in society is important, but they believe that a greater threat to order comes from allowing government too much power. What is more,

they are skeptical about the ability of the criminal justice system to deter and rehabilitate. At the same time they believe the system is biased against the poor and thus not only ineffective but unjust. Therefore, they are more concerned with system and product-characteristic goals than with output goals. They want to assure that the system at least operates fairly since it does not seem to be effective.

In contrast to the difficulty in defining the ultimate goals of the criminal justice system, defining its proximate formal goals is relatively easy. As Feeley states, "the formal task of the criminal justice system is to process arrests, determine guilt and innocence, and in the case of guilt to specify an appropriate sanction" (1973:407). It is against this background of the controversies of the justice system's various goals and in connection with the proximate tasks of processing cases that police and prosecutors come to question the compatibility of their respective organizational goals as well as the purpose of the overall system.

C. Goals of Police and Prosecutors

1. Review of the Literature

Trying to identify the goals of police and prosecutor organizations (not to mention the personal goals of individuals within those organizations) one enters a veritable quagmire. The multiplicity of views; the lack of conceptual clarity and consistency; the failure to operationalize and develop statements; and the differences in the level of analyses and the kinds of goals being discussed make it difficult to synthesize what has

been said. Summarizing this literature in a few words would bury a rich source of insight into this topic. Therefore, it is explored in some depth. Most of our own findings and conclusions are presented in the section following this review.

a. The Compatibility of Police and Prosecutor Goals

Several writers suggest that police and prosecutors share certain overall goals in common but conflict over proximate short-range tactical goals. For instance, McIntyre (1975:227) writes:

> "Police and prosecutors, like any two organizations whose basic goals are the same but whose immediate tasks are not, are bound to have some trouble in accommodating one another's needs without sacrificing their own identity. Nevertheless they have achieved this with relative success."

Similarly, Neubauer (1979:142) concluded:

> ". . . [P]olice and prosecutors [are] dedicated to the same overall goal--the sanctioning of criminal behavior-- . . . . [But] ultimately it the police and prosecutors want different things from the court process. The police want vindication; a conviction for the crime charged is positive reinforcement that the police officer is doing his job. Prosecutors, however, pursue goals other than convictions."

Other writers have emphasized the reverse, stressing the fundamental incompatibiity of police and prosecutor goals. For example, Feeley and Lazerson (1980:3) state:

> "[The] police and prosecutor [are] two separate and autonomous units, each with its own goals, norms, and system of control. Rather than sharing common goals, they [have] divergent and at times conflicting goals. . . .
>
> . . . [W]hile police and prosecutors must work together, they exist in perpetual tension. . . . The dominant concern of the police is order maintenance.
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> 'Quality' arrests resulting in conviction are in most cases not of paramount concern in the midst of

maintaining order.

> In contrast the daily work of the prosecutor does not involve him directly with order maintenance. [The prosecutor] is confronted with the task of dealing with cases in the refined language of law, not the blunt concerns of order maintenance."

Similarly, Stanko (1979:1) concludes that it is doubtful whether the police and prosecutors share a common set of goals. Instead there exist "two sets of rules, the external set for the entire [criminal justice] system's operations and the internal set for the individual's organizational operations. . . . [This] creates the potential for contradictory expectations, goals and outcomes for [police and prosecutors]".

Still other writers indicate that in certain limited ways the police and prosecutors want the same thing. Chambliss and Seidman (1971:274) report that police and prosecutors both prefer the crime control model of case disposition to the due process model (i.e., in Perrow's terms they agree on this particular "product-characteristic" goal). Yet several other studies imply that police and prosecutors disagree over a certain other product-characteristic goal, namely, the degree of punitiveness in dispositions. The police consistently appear to want more punitive outcomes in all matters than do prosecutors (Reiss, 1967; Battelle, 1977a:40).

Sometimes the police appear to want punitiveness for its own sake but this is not always the case. Frequently the police believe that the more punitive the sentence the greater its deterrent impact (see, e.g., Battelle, 1977a:40). Other times the police demand for punitiveness is a demand for recognition of

him punished. They become outraged when the results of their work is ignored." Reiss and Bordua conclude that "the police want an outcome that signifies for them their effort has been appreciated and that morality has been upheld." In short, depending upon what lies behind it the police demand for punitiveness may represent an incompatibiity of goals with prosecutors or merely a difference over the degree to which a common goal is being achieved.

b. The Compatibility of Police and Prosecutor Policies

Policy analysts have tried to avoid the ambiguity inherent in the discussion of organizational goals by developing their own conceptual language which focuses on specific actions, allocations of resources and actual outcomes of organizational efforts. Bauer and Gergen (1968) suggest that the notion of a "policy objective" should be reserved for choices of courses of action with wide ramifications and a long time perspective for an organization. Choices with more limited implications should be regarded as either tactical or trival decision making. Building on this suggestion Jacoby (1978) distinguishes between "policies" and "programs." Policies refer to the broadest level of decision making while programs are organized subsets of the organization's overall activities.

These distinctions are of some help but do not solve all problems. The greatest value of the language of policy analysis is in keeping the analysis focused on the organization's goals as distinct from the personal goals of individuals within the organization. Also the distinction between policies and programs

problems. The greatest value of the language of policy analysis is in keeping the analysis focused on the organization's goals as distinct from the personal goals of individuals within the organization. Also the distinction between policies and programs is useful in conceptualizing conflicts between police and prosecutors at the program level. But at the policy level the old ambiguity and multiplicity of goals continues to cloud the discussion. This became evident in our attempt to replicate Jacoby's (1980:112) analysis of the compatibility of the policy objectives of police and prosecutors by matching the different styles of policing identified by Wilson (1968) against the different prosecutorial policies she had identified (1979).

Wilson distinguished three styles of policing among police departments: the watchmen, the legislatic and the service. The watchman style is characterized by emphasizing order maintenance over law enforcement. The police department tends to ignore many common minor violations of law, tolerate a certain amount of vice and gambling, and enforce the law to a comparatively greater extent on the basis of the character of the persons being arrested rather than on the nature of the law violation itself. The legislatic style reverses this emphasis. The patrolman will be encouraged to take a law enforcement view of his role to pursue elicit enterprises more vigorously; to produce many arrests and citations; and to arrest in situations that would have been handled informally in a watchman style department. The service style is something of a cross between the legalistic and the watchman. The police take seriously both their law

enforcement and order maintenance responsibilities but are less likely to respond by making an arrest or otherwise imposing formal sanctions. They intervene in situations frequently but not formally.

Jacoby distinguished four prosecutorial policy objectives among prosecutors' officers: legal sufficiency; system efficiency; defendant rehabilitation; and trial sufficiency. Under the legal sufficiency policy the prosecutor's office devotes little effort to reviewing cases beyond establishing the minimal requirements of probable cause. Cases are dropped and plea bargained out of the system at high rates. The system efficiency policy is designed to dispose of cases as quickly as possible by as many means as possible. The initial case acceptance rate under this policy is not predictable; but once cases are accepted a major effort is made to get rid of them as fast as possible by several means (including referral to other agencies and plea bargaining at the lower court level). The defendant rehabilitation policy is one where the prosecutor believes that the best treatment for most defendants coming through his office is not to process them as criminals but to divert them into rehabilitation programs. Under this policy diversion, deferred prosecution and alternatives to formal adjudication are used extensively. The trial sufficiency policy is where the prosecutor's office rejects many cases for prosecution only accepting cases with a high probability of getting a conviction. Once accepted, these cases are not dropped out of the system or plea bargained down to minimal charges. Rather

they generally result in convictions usually to a serious charge.

Matching Wilson's three police styles with her own four prosecution policies, Jacoby (1980) suggests that some of these combinations are compatible while others are not. For instance, she states that the legalistic police style is incompatible with the prosecution policy of defendant rehabilitation but compatible with the legal sufficiency policy. When we attempted a similar analysis, however, we concluded that it was neither feasible nor meaningful. The main difficulty is that both the styles and the policies described by their authors refer primarily to system goals (the manner of functioning of each organization) rather than to output goals (purposes to be achieved, such as, retribution, deterrence, incapacitation, or rehabilitation). Except for the prosecution policy of defendant rehabilitation there is no apparent relationship between any of the police styles or the prosecution policies and any of these outcome goals.

One might speculate about which outcome goal is the intended goal of which police style or prosecution policy; but this is risky. For instance, it may be that prosecutors who adopt the legal sufficiency policy (accepting a lot of cases but dropping and bargaining a lot out) are more concerned with deterrence than prosecutors with the trial sufficiency policy (accepting fewer cases but dropping and fewer out and giving less away in plea bargaining. But, this is not how chief prosecutors in such jurisdictions see it. In jurisdictions with these widely differing policies, the chief prosecutors think of the output

goals of their policies in essentially the same terms. Each regards his policy as designed to deter crime although each goes about it in a different way. In oversimplified terms, the legal sufficiency policy imposes a little punishment on a lot of people whereas the trial sufficiency policy improves a lot of punishment on fewer but more carefully selected people.

The chief prosecutor in a jurisdiction identified by Jacoby as having a trial sufficiency policy felt his policy was deterring more crime than alternative policies would. In his view his high case rejection rate coupled with his extensive invocation of the habitual offender sentencing provisions allows his office to conserve limited court and correctional resources and make it possible to impose lengthy sentences on deserving (serious) criminals. In the absence of any research, his belief about the deterrent effect of his policy is as plausible as that of prosecutors who believe that other policies achieve the greatest deterrent impact.

As for Wilson's three police styles it is equally risky to speculate about their intended outcome goals because he gives little grounds to support such extrapolation. The focus of his analysis is on <u>system</u> (not on output) goals. Undoubtedly that is why he speaks of "styles" of policing. Furthermore, his styles refer only to that part of policing which deals with the handling of minor offenses and other order maintenance matters such as gambling and prostitution. When it comes to serious crime the differences between the styles apparently disappear.

Thus, in seeking the compatibility of Wilson's police styles

and Jacoby's prosecution policies it is not possible to identify incompatibilities of outcome goals. It is not possible to say, for example, that a certain police style is designed to maximize deterrence but is thwarted by a prosecution policy designed to maximize rehabilitation. Even examining the styles and policies as system goals it is not clear how they are incompatible as such. For instance, the legalistic police style's characteristic reliance on formal legal procedures to resolve matters is certainly different from the prosecution policy of rehabilitation with its characteristic use of informal means of disposition. But, this is not to say the two are <u>incompatible</u> in the sense being mutually self-defeating. The police will have achieved their goal which for legalistic style departments is to be able to say they did not abuse their discretion; and the prosecutor can get the dispositions he thinks are in the best interest of justice.

There are, however, two distinct but related questions which might be pursued. One is whether there is an association between type of police style and type of prosecution policy. Such research might provide insight into the important question of whether and in what ways these two organizations influence each other's overall operations. However, before such a global analysis is feasible considerable improvement in the conceptualization and measurement of the overall organizational policies of police and prosecution agencies needs to be done. The second question focuses on the connections between the organizational and the individual levels of analysis. One might speculate that

individual police officers operating in a particular style of police department (e.g. the legalistic style) would personally experience a stronger sense of antagonism and incompatibility with certain prosecution policies (e.g. defendant rehabilitation) more than with others. We suspect, however, that this is not the case. Although we are unable to analyze police opinions of prosecution policies by the style of the police department, it appeared that the police opinion was fundamentally the same everywhere. It was dominated by their resentment about case attrition and modification. None of Jacoby's four policies eliminate this basic reality. They just slice it differently.

c. The Incompatibility of Police and Prosecutor Programs

At the program level there is abundant evidence of differences in goals between police and prosecutors usually over the enforcement of offenses against morality including gambling, pornography and obscenity, prostitution, and drug offenses (especially marihuana possession). Typically the police give higher priority to the enforcement of these laws than do prosecutors. This difference between them seems to occur both in terms of their organizational objectives and their personal moral preferences.

In a national study of gambling law enforcement, Fowler, et. al. (1977:48) concluded that: (a) "police departments [need] to clarify their policies and priorities with respect to gambling law enforcement"; (b) "large majorities of all police officers agreed that prosecutors do not take gambling cases seriously, that they are too willing to accept reduced charges, and that

courts do not give appropriate sentences" (id.:27); and (c) "coordination between police, prosecutors and courts means achieving consistent goals and priorities. Unless each of them has a common conception of what is illegal and how seriously to treat various offenses, no set of goals can be achieved" (id.:41).

Clark (1966) asked police, prosecutors and the public in three Illinois cities whether a hypothetical situation "called for police action." It involved card games being played for large amounts of money in a private home. The card games were run by professional gamblers although the games were not crooked and no juveniles were involved. Ninety-one percent of the police, none of the prosecutors and 71% of the public felt the police should take action.

In a national survey the National Commission on Marihuana and Drug Abuse (1972:103) found that one quarter of the American public believes that criminal sanctions should be withdrawn entirely from marihuana use. Another quarter is equally convinced that existing policy is appropriate and would ordinarily jail marihuana possessors. The rest are ambivalent and unsure what policy is appropriate. A related survey of state prosecutors found a similar breakdown in the opinion about marihuana policy. Thirty-one percent stated that they would not prosecute anyone arrested at a private social gathering of marihuana users who were sharing a cigarette. One quarter of the prosecutors favor the policy of the criminalization of marihuana use; 20% believe it should be totally decriminalized; and the rest doubt

the deterrent value of the law, are willing to be lenient, but believe the law should stay on the books in the hope that it may have some deterrent value to prevent increased marihuana usage.

Unfortunately the National Commission on Marihuana and Drug Abuse did not ask police for their opinions on this topic but some insight into police opinion is contained in the testimony of Edward Davis, Chief of the Los Angeles Police Department and President of the International Association of Chiefs of Police, before the House Select Committee on Narcotic Abuse and Control in connection with hearings on proposals to decriminalize marihuana.[12]

> "I represent the International Association of Chiefs of Police, more than one hundred thousands members. We have adopted resolution rather annually on this subject. We have very strong feelings about the subject.
>
> Moderate penalties can be extremely effective in adjusting human behavior.
>
> The International Association of Chiefs of Police absolutely opposes any relaxation of our national marihuana law. Decriminalization of marihuana can be counted on to tremendously increase marihuana abuse.
>
> I have a report from Maine where they polled 130 chiefs who all opposed decriminalization.

Yet another national study (Smith and Locke, 1971:40), this one on the enforcement of obscenity and pornography laws, reported differences between police and prosecutors in their attitudes towards the enforcement of the laws involved.

> "[G]enerally speaking, the police throughout the country feel that the enforcement of obscenity and

12 U.S., Congress, House, Select Committee on Narcotic Abuse and Control, Hearings, 90th Cong., 1st Sess., 1977, p. 82.

> pornography statutes takes a low priority as compared to crimes of violence, burglary and larceny. However, the police (as compared to most prosecutors) feel very strongly about this area of law enforcement. Many emphasize a strongly puritanical ethos, feel that pressure must be kept up because pronography is a source of corruption, and consistently indicate that so long as the laws are on the books they must be enforced. Many who say that they have very little concern about pornography in the hands of adults insist that strict legal controls on gray areas of pornography are necessary because so much of the materials sold to adults filter down to children."
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> In contrast, "[p]rosecutors generally feel some of the same frustrations that the police do about their inability to gain convictions in obscenity and pornography cases, but their attitudes tend to be somewhat more philosophical about this problem. Most of the prosecutors seem content to wait until the Supreme Court comes out with a ruling, or some constitutional amendment or law is passed which will make it possible to proceed successfully against dealers in the gray areas of obscenity and pornography."

It has been suggested (National Advisory Commission on Criminal Justice Standards and Goals, 1976; and Fowler, et. al., 1977) that inconsistencies in the enforcement policies of police and prosecutors such as those described above should be eliminated. In our view, however, such inconsistencies are not necessarily dysfunctional especially when the laws involved are controversial and opposed by reasonable and substantial segments of the general public. Inconsistencies in the enforcement of such laws serve the interests of a pluralistic society by providing a compromise between the conflicting demands on the system. The value clashes that exist between groups in society with differing views as to the propriety of specific laws are partially satisfied by having the criminal justice system both "do something" about these matters and yet not become overly intrusive or punitive.

2. Findings and Conclusions

Our findings and conclusions regarding what the goals of police and prosecutors are and whether they differ are organized below around Perrow's five types of goals.

a. Social Goals

Police and prosecutor organizations have the same social goals. They are society's formal instruments for preserving two social values, the control of crime and the rule of law. But the two organizations conflict because they have different allegiances to these values which are themselves partially incompatible. They also conflict because of mutual misunderstandings of each other's role in crime control.

Controlling crime can be done most effectively and efficiently if the police are unrestrained by legal rules. Maximum efficiency is reached in a totalitarian state where the police have virtually complete discretion to arrest, search and detain anyone, for any reason and on the basis of little or no evidence. But in a free society the police are not given this power because the society values freedom from government arbitrariness and interference in addition to valuing the control of crime. Therefore numerous legal restrictions are placed on how the government may proceed in its efforts to control crime. Police and prosecutors (and all government agents) are expected to abide by these restrictions and thereby uphold the ideal of the rule of law. Yet at the same time they are expected to effectively control crime. The partial incompatibility of these two demands is conveyed by the images the police often use to describe their

position in the fight against crime. They often say it is like fighting a person with one hand tied behind your back or that while they play by the Marchese of Queensbury's rules while their opponents are allowed to play with no holds barred.

Where society regards two incompatible values as both desirable and tries to maximize each, conflict is inevitable. Moreover, if both values are the concern of a single organization then when the conflict occurs one value will be suppressed in favor of the other. On the other hand, if responsibility for the two values is divided between two independent organizations, both values are more likely to be preserved but the two organizations will become antagonist.[13]

The American legal system has not officially divided the responsibility for crime control and legality between police and prosecutors. Theoretically both agencies are equally responsible for the preservation of both values. In reality, however, there is a division of concern between them. The police are more sympathetic to and operate under more immediate pressures for crime control whereas prosecutors are more sympathetic to and subject to the requirements of the rule of law. While this informal division of concern causes antagonisms between police and prosecutors, it benefits society. It helps to insure that neither value is sacrificed for the other. This protection is fortified by the fact that police and prosecutors in America are

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13 The logic of this analysis and supporting evidence from the field of organizational research has been developed by Litwak and Hylton, 1972.

members of independent organzations (unlike the British system).

Besides the antagonism generated by their differential allegiance to the values of crime control and legality, police and prosecutors clash in the course of controlling crime. That job consists of two distinct functions, maintaining order and enforcing law. Both organizations perform both functions. But clashes between them occur because of misunderstandings of each other's order maintenance functions.

The order maintenance function of the police has long been described by numerous writers (Wilson, 1968; Bitner, 1970; Cumming, et. al., 1970; Whittington, 1971; Shane, 1980; American Bar Association, 1980). Much of policework involves the settling of disputes or dealing with behavior which might lead to disputes or disruptive conduct, such as family quarrels or public drunkenness. In handling these matters the police objective is to keep the peace. They do this by employing a variety of informal remedies short of invoking the formal legal sanction of arrest (such as taking an angry husband for a ride until he cools off). Occasionally, however, they will make arrests either as a way of getting lawful control over situations in which they could not otherwise restore order (e.g. arresting a noisy drunk at a tavern who refuses police requests to leave), or because in the course of the encounter they unexpectedly discover contraband (such as marijuana) and feel compelled to arrest in order to avoid the appearance of laxity.

Prosecutors generally lack an appreciation of the order maintenance function of the police partly for lack of street

experience and partly because these police activities lie in the grayer areas of legal propriety. Consequently prosecutors are either unaware or unsympathetic to how their policies and attitudes generate conflict with the police over this matter, as illustrated below.

Illustration 3.1

> In jurisdiction 15, the prosecutor established a policy which prevented the police from handling the common problem of domestic and neighborhood disputes in the flexible and, in the police opinion, appropriate way they had done in the past. Because of a recent revision in the state rules of criminal procedure (which the prosecutor had supported), the police were no longer allowed to arrest in misdemeanor cases on their own authority unless the misdemeanor occurred in their presence. The local prosecutor directed the police to take no action in these misdemeanor cases beyond filing a brief report and informing the complainant he or she must appear in person during normal business hours at the local police department to file a complaint.
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> The local police sharply criticized this new policy arguing that it not only prevented them from carrying out their order maintenance function but put them "between a rock and a hard place." Domestic and neighborhood disputes typically involve high emotions easily triggered into violence. The greatest practical benefit of police intervention in such situations is in separating the parties and allowing emotions to cool off. Now the police were reduced to telling the woman in fear of being brutalized by her husband at 11 o'clock at night that there was nothing they could do but take a report. If she wanted him arrested she would have to file a complaint in person the next business day--at which time, of course, the immediate danger would have passed and the woman would not want her husband arrested, even if he had beaten her in the interim.
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> The prosecutor's policy made good sense in a short-sighted way from the perspective of reducing his incoming caseload. An in-house study found that over 70% of all victims of misdemeanors did not pursue their cases beyond calling the police.
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> But the police were left with an unpleasant choice. If they tell the irate citizen they cannot do

anything, they are berated for the "stupidity" of "their" policy and for their unwillingness to "do their job" in a situation which the citizen "pays his taxes to have taken care of" and is sure he "has a right to under the American Constitution." If, on the other hand, the police believe there is a real potential for violence and feel they must make an arrest, they are forced to "stretch the truth" and state on the official report that a felony had been committed. (With a felony they can act on their own authority.)

Ultimately this policy has had four negative consequences. The police have been forced to lie in order to do what they regard as necessary in some situations; the prosecutor is receiving "felony cases" which eventually have to be screened out; the official criminal statistics in the jurisdiction are artificially inflated by felonies which would otherwise have been counted as misdemeanors; and the police are antagonized for having to "take the heat" for a policy they did not make and do not approve.

Illustration 3.2

> In jurisdiction 11, a police officer complained about the prosecutor's charging practices citing the fact that they interfered with his order maintenance function. He had a case where he arrested a defendant only to avoid a volatile situation on the street. He did not intend to have the person prosecuted because he knew him to be a former offender who had "been going straight for a long time." But the defendant qualified under the local prosecutor's definition of career criminal and the prosecutor refused to drop the case. For the policeman that meant he had to be far more cautious about using his arrest powers in the course of exercising his order maintenance functions in the future.

Prosecutors also have a large order maintenance function which is often misunderstood by the police. A substantial portion of the cases referred for prosecution involve disputes between people who know each other. These disputes have erupted into technical violations of law. In its study of felony cases in Manhattan the Vera Institute of Justice (1977) found as much as 56% of the crimes against persons and 35% of the crimes

property involved people who know each other. These cases were consistently disposed of in a more lenient fashion than those of crimes between strangers. That is, they were more likely to be rejected, dismissed, plea bargained and sentenced to more lenient sentences.[14]

These cases end up in the courts because there is no other institution in society for settling them. Undoubtedly many are cases where the police tried and failed to restore order without making an arrest as, for example, the situation where a girl insists that the police arrest her estranged boyfriend who just broke through her apartment door while threatening to beat her up. The dispute might have been resolved informally by the police themselves had they arrived a few minutes earlier. The fact that it gets referred to the prosecutor for resolution does not change the basic nature of the case. Prosecutors will not see it as a predatory crime deserving full prosecution but as a largely personal dispute to be settled through some non-trial disposition such as diversion, restitution, referral to some treatment agency or simpling dismissal. The police, however, will see these cases eventually being dropped or plea bargained out of the system and this will reinforce their view that the prosecutor drops and bargains too many cases.

b. Output Goals

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14 This is due in large part because of the practical difficulties of getting convictions in such cases. Complaining witnesses change their minds about prosecuting; victims sometimes appear as guilty as the defendants; juries do not like to convict in such cases.

The output goals of police and prosecutor will be analyzed first in terms what goals they have for the criminal justice system as a whole and then in terms of their individual organizational output goals. Police and prosecutors appear to agree with each other on and generally support four of the five output goals of the criminal justice system (deterrence, retribution, incarceration, and restitution but not rehabilitation). Of the five the police tend to be most concerned with deterrence. They often seem preoccupied with a desire for long sentences and they regard dispositions without any incarceration as a waste of their efforts. This demand for prison time is linked to an underlying faith in the deterrent power of severe sentences. It is this belief that engenders resentment against prosecutors and plea bargaining, as evidenced in the comment of a patrolman who told us:

> "Personally [plea bargaining] offends me because we're here to stop crime . . . deterrence is important. We get minimum sentences and it will not deter them from doing it again."

Prosecutors share the police concern about deterring crime and they agree that incarceration can have a deterrent impact in some situations. Thus in response to a growing rate of armed offenses a prosecutor's office may establish a policy of requiring some prison time in all plea bargains involving armed offenses. But, in other ways prosecutors differ from the police in their views about deterrence and incarceration. Prosecutors are more skeptical about the ability of the legal system to deter certain crimes. For instance, a survey of police executives

found they were unanimously and strongly convinced of the deterrent value of marihuana laws[15] but a similar survey of executive-level prosecutors found that 75% of them regarded marihuana laws as having little or no deterrent value (National Commission on Marihuana and Drug Abuse, 1972).

Prosecutors also tend to be skeptical about any simple relationship between severity of punishment and deterrence. In any event, when they are determining the length of sentence to be sought their calculations are more often in terms of local standards of "reasonable" sentences rather than in terms of how much severity is needed to deter that crime. Furthermore, their calculations are heavily influenced by the practical consideration of whether they could win the case at trial. A lenient sentence in a weak case is in their view a stronger deterrent than losing the case at trial.

Turning from the output goals that police and prosecutors want from the overall justice <u>system</u> to the output goals of their respective <u>organizations</u>, the perspective shifts. The two organizations now must be examined as subunits of an overall system whose joint effort is needed to accomplish the goals of that larger system. From this perspective police and prosecutor organizations are linked in a relationship of supplier and consumer. In theory the police should supply the prosecutor with

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15 Testimony of Chief Edward Davis on "Decriminalization of Marihuana," U.S. Congress, Select Committee on Narcotics Abuse and Control, <u>Hearings</u>, 95th Cong., 1st Sess., March, 1977, p. 83.

what he needs to do his job which is to convict the guilty, acquit the innocent, protect other social interests at stake and dispose of all other cases in a timely, efficient and equitable fashion (see generally, American Bar Association, 1979). This means supplying well-documented cases whose real merits are apparent so that deserving cases can be convicted and sentenced appropriately. That is, the police should have a conviction-orientation towards case preparation as well as in regard to measuring their own performance. But, they do not. Instead of defining their law enforcement mandate as something which ends with the conviction of a case, the police have defined it as ending with arrest. This is reflected in the organizational and personal performance measures they use for rating themselves. Rather than using conviction rates or dismissal rates or plea bargaining rates (all of which are related in part to the quality of the policework in the case) the police use arrest and clearance rates. They justify this on the reasonable grounds that unlike conviction, dismissal, and plea bargaining rates, clearance and arrest rates are more clearly a reflection of police performance uncontaminated by other factors.[16] But, notwithstanding the apparent reasonableness of this argument,[17]

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[16] Others have given a more cynical interpretation of this (Manning, 1979; Reiss and Bordua, 1967). They suggest that clearance and arrest are used by the police as performance measures because they can be controlled and manipulated by the police while other rates cannot.

[17] This argument is addressed again in Chapter 5 where a rationale is presented for the development of new measures of police performance that are linked to a conviction-

(Footnote continued)

its net effect is to reinforce the truncated definition of the police mandate as ending with arrest and clearance.

This constricted definition of the police mandate represents a major incompatibility with the needs of the prosecutor and of the overall system of justice. It causes a systematic bias against making cases as strong as they need to be for the prosecutor. This builds in a self-defeating circle of events in which prosecutors are forced to be lenient in plea bargaining in order to get pleas in weak cases. This, in turn, causes the police to be annoyed at prosecutorial leniency which causes further tensions between police and prosecutors and further reduces what little incentive there is for the police to bring in strong cases and to do post-arrest follow-up investigation. Once the arrest has been made and the clearance statistic obtained, any additional work by the police is just "doing a favor" for the prosecutor, "making him look good" or "doing his job." An executive assistant prosecutor with six years experience and who was a declared candidate for local sheriff put it this way, "The number of arrests are after all what the newspapers use to grade the chief of police. There is an absolute motivation on the part of the executive police officer to make an arrest and then take the attitude that the rest of the work is the prosecutor's problem."

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[17] (continued)
orientation but are also uncontaminated by the performance or policies of the prosecutor or other confounding factors need to be developed.

It appears that until and unless the police adopt a conviction-orientation the community will not receive the standard of justice that it needs. A conviction-orientation does not mean a demand for punitiveness or for every case to be disposed of at trial. It means that for those cases which are intended to be processed through to conviction the strongest possible cases should be made and the police should measure their performance in terms of the degree to which they have made those cases strong. There are some positive signs that this may eventually come about. Most encouraging is the finding of the Police Chief Executive Committee of the International Association of Chiefs of Police (National Advisory Commission on Standards and Goals, 1976:117) that there has been a shift in police thinking in the direction of taking a greater interest in what happens to cases after they are referred for prosecution. The Committee reports:

> "A prevalent philosophy a decade ago was that the police should do their job without concern for the efficiencies of other criminal justice agencies. If the prosecutor refused to file a complaint, if the courts dismissed an action, or if the parole board released the criminal, the police were told they should not be concerned. The police adopted the philosophy that they should be insensitive to what others did, but should continue to do their best and ignore the actions of other criminal justice agencies. That philosophy has changed. The police have become interested in what others in the criminal justice system do."

But, there is a long way from being interested in what others do to developing a conviction-orientation in which one acknowledges partial responsibility for what others do and one develops performance measures keyed to the information needs of the prosecutor at trial rather than the information needs of the

police officer at arrest. Some of what is needed to be done before this gap can be bridged will be presented further in the discussion on case feedback (Chapter 5).

c. Product-Characteristic Goals

When one asks the police what characteristic they want most in case dispositions the answer is invariably greater severity in sentencing. Our findings in this regard parallel those of others (see Reiss, 1967; and McIntyre, 1975). However, it appeared to us, as it did to McIntyre, that this punitive attitude may be a form of exaggerated public posturing. He concluded that "[t]he extreme impression police sometimes leave is unfortunate because when they are pinned down it becomes clear that most of them do not feel that strongly . . . that all criminals should be put in jail" (McIntyre, 1975:214).

We examined the police complaint that prosecutors are too lenient in greater depth in order to determine how much the two groups differed in this product-characteristic goal. We presented representatives of both groups with the same hypothetical armed robbery case and asked them to decide how the case should be disposed and on what terms. Contrary to expectations the police were more lenient than prosecutors along all five dimensions of the disposition decision (see Tables 3.1 through 3.5). The police were more likely than prosecutors to be

lenient in the choice of disposition (18% of police compared to 6.6% of prosecutors recommending dismissing the case); more likely to be lenient in the choice of charge (only 43.5% of the police compared to 69.2% of the prosecutors recommended the case be plea negotiated out as charged as opposed to a reduced charge); more likely to be lenient in the choice of where the sentence should be served (56% of the police recommended prison and 22% recommended jail compared to 63% of the prosecutors recommending prison and only 14% recommending jail); more likely to be lenient about recommending probation (19.6% of the police recommended straight probation compared to only 8.4% of the prosecutors); and more likely to be lenient in terms of the length of sentence recommended (only 29.7% of police compared to 49.6% of prosecutors recommended 5 or more years).

Table 3.1

COMPARISON OF POLICE AND PROSECUTORS' RECOMMENDATIONS REGARDING TYPE OF DISPOSITION FOR A HYPOTEHTICAL ARMED ROBBERY

Dispositions Recommended	Prosecutors [N=136]	Police [N=61]
Go to trial	7.4%	6.6%
Dismiss/nol pros	6.6%	18.0%
Plea bargain	86.0%	75.4%

$x^2 = 6.02$ $P < .05$

Table 3.2

COMPARISON OF POLICE AND PROSECUTORS'RECOMMENDATIONS REGARDING LEVEL OF CHARGE TO BE SOUGHT IN PLEA BARGAINING FOR A HYPOTHETICAL ARMED ROBBERY [Based only on respondents who recommended the case be plea bargained]

Level of Charge to be Sought in Plea Bargaining	As recommended by: Prosecutors [N=117]	Police [N=46]
As charged	69.2%	43.5%
To a lesser felony	24.8%	45.6%
To a misdemeanor	6.0%	10.9%

$x^2 = 9.28$ $p < .01$

Table 3.3

COMPARISON OF POLICE AND PROSECUTORS' RECOMMENDATIONS REGARDING LOCATION OF WHERE SENTENCE SHOULD BE SERVED FOR A HYPOTHETICAL ARMED ROBBERY [Based only on respondents who recommended the case be plea bargained]

Location of where sentence should be served	As recommended by: Prosecutors [N=106]	Police [N=46]
Time in prison	63.2%	56.5%
Time in jail	14.2%	21.7%
Probation plus time	14.2%	2.2%
Probation	8.4%	19.6%

$x^2 = 9.03$ $p < .05$

Table 3.4

COMPARISON OF POLICE AND PROSECUTORS' RECOMMENDATIONS REGARDING TYPE OF SENTENCE FOR A HYPOTHETICAL ARMED ROBBERY [Based only on respondents who recommended the case be plea bargained]

Type of Sentence	As recommended by: Prosecutors [N=106]	Police [N=46]
Some time incarcerated (jail or prison)	91.6%	80.4%
Straight probation	8.4%	19.6%

x^2 = 3.76 Not significant

Table 3.5

COMPARISON OF POLICE AND PROSECUTORS' RECOMMENDATIONS REGARDING LENGTH OF SENTENCE FOR A HYPOTHETICAL ARMED ROBBERY

Recommended Sentence	As recommended by: Prosecutors [N=121]	Police [N=37]
1-6 months	6.6%	2.7%
6 months- 1 year	12.4%	10.8%
1-2 years	10.7%	16.2%
2-5 years	20.7%	40.5%
5 years & more	49.6%	29.7%

x^2 = 8.44 Not significant

These findings are in sharp contrast to the police public posture of demanding more punitive dispositions and of criticizing prosecutors for plea bargaining cases. They make one wonder what the real nature of the police complaint about prosecutors is and what the police really want from the criminal justice system. Part of the answer to these questions is suggested by an in-house study by the New Orleans Police Department. The study generally parallels our findings but extends them beyond the one hypothetical armed robbery case. The study implies that much of the police complaint about dispositions is in the nature of generalized, unreflected grumbling rather than informed criticism based on realistic appraisal of the merits of individual cases. Alarmed over the high rate of case rejection by the local prosecutor's office, the New Orleans Police Department established a special unit which reviewed all cases before they were sent to the prosecutor. For each case the police kept track of the disposition which they wanted to get after they had reviewed its merits. When the deserved disposition was compared to the dispositon the case actually received, the two were in agreement 90% of the time!

We agree with the implications of the New Orleans study and with those of McIntyre's. Some of the police complaint about prosecutorial decision making would diminish if the police were required to be specific and identify their criticisms in individual cases based on realistic appraisals of those cases. But, our interviews and other evidence suggest there is something else at work. It is the police desire to have input into the

disposition decision making process. It is about the system goals of the police.

d. System Goals

Police and prosecutors are largely in agreement regarding how they would like to see the criminal justice process organized and operated. Up to a point they are both advocates of Packer's (1968) crime control model of the process. They both advocate efficiency, finality, speed, and the minimum number of legal obstacles to successful prosecution. But, they part company over the twin engines of the crime control model, namely, case rejection and plea bargaining. The police disapprove of case attrition and the informality of plea bargaining. They would prefer that more cases go to formal adjudication at trial. In contrast prosecutors find case rejection and plea bargaining as necessary, acceptable and, not infrequently, preferable to a trial disposition.

But, as already indicated, to some extent these differences are more apparent than real. The police complaint about plea bargaining and case rejection is not primarily about leniency (although that is part of it). It is not primarily about questions of the legitimacy of the prosecutor exercising such broad powers of discretion (although that is part of it). It is that the system of justice by negotiation and attrition has not institutionalized police input into the disposition process. This in turn means that its manner of functioning does not give due recognition to the professional investment and proprietary interest of the police in the case disposition decision making

process; and it does not accord the police professional status equal to the other three professional groups involved in that decision making, namely, prosecutors, judges and defense attorneys. Where the police have input into the disposition decision making process and their views are, at least, taken seriously (although not necessarily given controlling or veto power), the police complaint about plea bargaining and case rejection diminishes and their satisfaction with case outcome decisions increases.

Evidence for these conclusions comes from several sources: (a) the substantial discrepancy between the vociferous complaints by police about prosecutorial leniency and the substantial leniency shown by the police when given the simulated opportunity to make the prosecutor's decisions for themselves; (b) the widespread complaint by police about lack of communicaton with the prosecutor especially regarding police input into case dispositions (see Table 2.1, Chapter 2); and (c) other studies especially the work of Arcuri (1973 and 1977) and Kerstetter (1979a and 1979b).

Arcuri (1977) reports that 69% of the 340 police officers surveyed resented prosecutors who plea bargained cases before discussing the case with the police officer. Kerstetter (1979a and 1979b) analyzed the results of an experiment in Dade County, Florida where police were allowed to participate in a structured plea negotiation conference in which the judge, the prosecutor, the defense attorney and frequently the defendant and victims were present. The police were not given controlling or veto

power but were allowed to participate in discussions as to the facts of the case as they knew them and as to what in their opinion the appropriate disposition should be. He found that: (a) the police saw themselves as the least influential of all the parties to the discussion; (b) that those police who attended the conference compared to those in the control group that did not had this perception changed significantly in the direction of seeing themselves as having greater influence in the decision making; (c) that police officers who participated in the conference were significantly more satisfied both with the disposition process and with the case disposition outcome; and (d) that among police officers attending the conference, satisfaction with the disposition of the case increased the perception that their version of the facts and their recommendations for dispositions were given increased prosecutorial and judicial attention.

Kerstetter's findings complement our own and support us in concluding that police satisfaction with the disposition process can be improved without radical changes in the criminal justice process. Improvements can be made by developing ways for allowing the police to have input into the case disposition decision making process and for that input to be taken seriously. Allowing for such input would reduce the conflict between police and prosecutors as well as the demoralizing impact of plea bargaining on the police. Most importantly, it would improve the quality and amount of information available to the decision maker and, thereby enhance the quality of justice that can be

administered.[18]

e. Derivative Goals

Police and prosecutor organizations are similar in the use to which they put the power which their organizations generate by their mere existence. Typically they use it to try to influence elements in their environments for their own purposes. Common targets for influencing are the state legislature, the county or city officials who control funding decisions, public opinion, and frequently each other. Prosecutors can influence the police directly by refusing to prosecute their cases. This tactic is occasionally used to counteract police practices which prosecutors regard as improper. For instance, in Milwaukee, Wisconsin, the U.S. Commission on Civil Rights (1972:53), found that the District Attorney's office refused to prosecute gambling cases as state crimes because the office had found gross inequities in the way in which the police were enforcing that law. The law was being more stringently applied in the black community than anywhere else. Gambling raids were almost always exercised in that one area.

The police are not able to influence prosecution practices as directly. But, they have ways. In some communities the police vote can make the difference in the election of the district attorney. Incumbent district attorneys are aware that police officers take an active interest in local elections and

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18 This last point is developed extensively in Part IV of this report.

are cautious about losing their vote. In all communities the police are familiar with certain tactics they can use to "put the heat" on the prosecutor's office. One notable tactic is used in several cities to counteract the common prosecutorial policy of not accepting minor assult cases. The police tell the victim or the news media that they know who the criminal is and even have sufficient evidence to arrest but are taking no action because the prosecutor is not interested in such cases. Sometimes this ploy is made a little more dramatic by waiting until several such cases accumulate so that it appears that the prosecutor is ignoring a minor crime wave. The police feel such tactics are justified because they should not have to "take the heat" for the prosecutor's policies.

The tactic of going to the newspapers is used by both organizations. Sometimes it is done to influence the other organization. More often it is part of an ongoing underlying competition between the two for favorable public opinion. This is frequently obtained or maintained by each organization only at the expense of the other. When the public becomes displeased with the criminal justice system, the component organizations often try to salvage their respective public images by pointing the finger at the other guy. The newspaper headlines below (each from a different city) typify this widespread and commonplace public conflict.

POLICE-D.A. TENSION NOTHING NEW (Morrison, 1979:1).

FEDERAL, STATE DISCORD MARS DRUG SMUGGLING INVESTIGATION The local prosecutor who ran the . . . investigation called it "successful." A federal drug enforcement official called it "illegal" (Babcock,

1979:A5).

U.S. ATTORNEY TELLS POLICE TO DEVELOP STRONGER DRUG ARREST CASES (Kamen and Weiser, 1981:B1).

70% OF CASES DECIDED BEFORE TRIAL . . .[P]olice detectives . . . charged that [plea bargaining] is too widespread. . . . State's Attorney defended the amount of bargaining . . . (Cummings, 1979:4A).

ARLINGTON POLICE CRITICIZE PROSECUTOR'S ROLE IN PROBE. Arlington police publicly demanded yesterday that the county prosecutor . . . remove himself from the investigation of the shooting of an Arlington real-estate salesman and his fiancee last year (Shaffer and Boodman, 1979:C1).

D. C. POLICE, PROSECUTORS CLASH OVER DROPPED CHARGE (Weiser, 1980:C1).

POLICE KEPT PROSECUTOR IN DARK WHEN BINGO PROBE WAS REOPENED (Meyers and Seaberry, 1978:A1).

RIZZO TELLS PANEL PRESS STIRES CHARGES OF POLICE BUTALITY . . . [The chief of the local district attorney's police brutality unit] characterized the [Philadelphia police department] as a "dinosaur that needs to be brought up-to-date," [and] said the department has routinely denied his office evidence required for prosecution of police brutality cases (Cory, 1979:A2).

D. Conclusions

As with all organizations identifying the goals of police and prosecutor organizations is a useful but complex exercise. The difficulty is compounded by the fact that these two organizations are parts of a larger whole which itself has goals. The criminal justice literature is in disagreement over whether police and prosecutors have the same or different goals. But, a large part of that disagreement is semantical. It results from the failure to distinguish among types of goals and to systemmatically compare the two organizations in terms of these goals.

Using the five types of goals developed by Perrow ((1972) police and prosecutors were found to have certain types of organizational (and personal) goals in common, but this does not assure harmony between the two organizations.

The social goals (major social functions) of both police and prosecutor organizations are officially the same. In a free society both are supposed to be to control crime and disorder and to preserve the rule of law. In practice, however, conflicts arise in the pursuit of these goals for three primary reasons. The prosecutor's function intervenes between the police and their goal of enforcing law by convicting criminals. Prosecutors often frustrate police efforts to achieve that goal by rejecting, dismissing, negotiating a case or losing it at trial. Some of the cases that are deliberately dropped from the prosecution or pled down to lower charges represent specific disagreements at the policy level between police and prosecutors as to which laws shall be enforced and at what level. Other times the disagreements are limited to conflicts between individual police officers and prosecutors over the value of particular cases. Such conflicts are not uncommon and occasionally result in physical hostility such as fist fights and tire slashings. At the policy level the disagreement involves the non- or minimal prosecution of certain classes of cases (often vice crimes) and these disagreements occasionally result in battles between police and prosecutors fought out in the news media.

The second source of conflict between police and prosecutors in achieving their social goals arises from their performance of

their respective order maintenance functions. The main problem here seems to be a mutual misunderstanding of the other's order maintenance function and of the mutual dependence of each agency on the other for fulfilling this function.

The third source of conflict over social goals is due to the differential allegiance of police and prosecutors to the goals of crime control and the rule of law. The police are more sensitive than prosecutors to the demand for crime control and prosecutors are more sensitive than the police to the requirements of legality. This is partly due to differences in their social and individual backgrounds but primarily due to the differences in the nature of their law enforcement tasks and their structural relationship to the public. In enforcing law the police are under greater scrutiny from the public as well as greater pressure for immediate action. What is more, unlike prosecutors the police come in direct physical contact with defendants and are often involved in dangerous and sometimes painful and disgusting situations. Under these circumstances it is difficult to devote as much enthusiasm to preserving the rule of law as to controlling crime. In contrast, prosecutors being removed from the pressures of the street and having substantial training in the law are better able to play the role of the detached, reasonable man following the dictates of law. But, the aloofness and objectivity of the reasonable man can easily be resented and misunderstood by the man who is emotionally committed and who lives daily with the unreasonableness and inequities of the street.

Police and prosecutors are in partial agreement over the output goals they want for the criminal justice system. Both emphasize deterrence, retribution, and incarceration. But, prosecutors tend to be more skeptical about the deterrent power of selected laws and more willing to see rehabilitation and restitution as output goals.

As for the output goals of the individual organizations, the police are in a special relationship to prosecutors, namely that of supplier to consumer. Theorectically the output goal of the police should be to supply all (or most) of what the prosecutor needs for input. This means supplying well-documented cases (i.e. information) capable of being convicted at trial if the merits so warrant. This requires that the police be oriented toward conviction and measure their performance accordingly. But, the police have not adopted this goal. Rather, they define their mandate as ending with arrest and their output goal as arrests and clearances. This represents a major incompatibility with the goals of the prosecutor and of the system. (It is discussed in depth in Part IV of the report.)

With regard to product-characteristic goals the police believe they differ from prosecutors in wanting more severe dispositions than prosecutors. However, it was found that when police and prosecutors were given a hypothetical armed robbery case and asked for their recommendations as to the police were more likely to be lenient than prosecutors in terms of the choice of disposition; the choice of charge; the choice of where the sentence should be served; the type of sentence; and the length

of the sentence. This together with other findings suggest that the main police complaint about prosecutors (namely, that their disposition policies are too lenient) is not primarily about product-characteristic goals (i.e., the leniency of decisions) but about system goals. That is, the complaint is about the way the disposition decision process is organized and what information is used in reaching decisions. The police complaint is that the system of negotiated justice does not give due recognition to the professional investment and proprietary interest of the police in the case disposition process. It does not accord the police the opportunity to participate in that decision making process in a way that allows them to introduce information which might not otherwise be considered and which simultaneously accords them professional status similar to that of the other three professional groups involved in that process, namely, prosecutors, judges and defense attorneys.

Police satisfaction with the disposition process can be improved without radical changes in the criminal justice process. Improvements can be made by developing ways for allowing the police to have input into case disposition decision making and for that input to be taken seriously. Allowing for this would reduce some conflict between police and prosecutors; would reduce some of the demoralizing impact of plea bargaining on the police; and would also supply information useful to the decision makers.

With regard to the fifth and last type of goal, namely, derived goals, police and prosecutors use the power generated by their operations to do the same things, namely, to influence the

community, the legislature and the local funding sources regarding matters they value especially their organization's public image. In addition they try to control each other and to gain favor with the public at the other's expense.

CHAPTER 4, THE DIVISION OF LABOR BETWEEN POLICE AND PROSECUTORS

A. The Non-system of Justice

The criminal justice system is frequently referred to as a "non-system." This label has two distinct meanings. One refers to the fact of horizontal and vertical fragmentation in the system, i.e., the fact that the criminal justice system is not one organization with a hierarchical command structure and some chief executive at the top with the power to coordinate the activities of the component parts. The other refers to the inefficiencies, inequities, and self-defeating inconsistencies which that fragmentation causes. These points have been made repeatedly since the earliest crime commissions. In 1931 the Wickersham Commission (U.S. National Commission on Law Observance and Enforcement, 1931:17) observed:

> In the typical American state policy, police, sheriff's office, coroner's office, and prosecuting attorney's office are wholly independent. Each may and often does conduct its own separate investigation of the same crime. They cooperate or cross each other's tracks or get into each other's way as they like. Each is independently responsible; the police to a municipal authority or a State commission; the sheriff, coroner and prosecuting attorney to the people. Often each is quite willing to score at the expense of the other. Not infrequently each is unwilling to aid the other as a rival candidate for publicity. The country over there is frequent and characteristic want of cooperation between the investigating and prosecuting agencies in the same locality. A prosecutor may work with police or not, and vice versa. Many examples have been found of these public agencies at cross-purposes or at times even actively thwarting one another, with no common head to put an end to such unseemly and wasteful proceedings.

Almost a half century later the American Bar Association

Committee on Crime Prevention and Control (1972:7) echoed the Wickersham observations:

> The American criminal justice system is rocked by inefficiency, lack of coordination and an obsessive adherance to outmoded practices and procedures. In many respects, the entire process might more aptly be termed a non-system, a feudalistic confederation of several independent components often working at cross purposes.

Until recently many of the complaints about the non-system were more in the nature of cursing the self-imposed darkness rather than prologues to lighting a few matches of reform. It is sometimes noted that this fragmentation is the result of deliberate sacrifices in efficiency and effectiveness in order to protect other fundamental American concerns, namely, autonomy of local government; a system of checks and balances to prevent monolithic governmental power; and protection against encroachment of individual liberties. For instance, in 1967 the President's Commission on Law Enforcement and Administration of Justice (1967:7) wrote:

> The system of criminal justice America uses . . . is not a monolithic, or even consistent, system. Our system of justice deliberately sacrifices much in efficiency and even ineffectiveness in order to preserve local autonomy and to protect the individual. Sometimes it may seem to sacrifice too much.

Sometimes there have been calls for greater cooperation and consistency among the component parts of the justice system. The Natonal Advisory Commission on Criminal Justice Standards and Goals (1973:133) wrote:

> . . . [No] element of the criminal justice system completely discharges its responsibilities simply by achieving its own immediate objectives. The police, the prosecutor, the courts, and probation, parole and corrections agencies must cooperate with each other if the system is to operate effectively. This requires an effort on the part of each element to communicate with the other elements, even though this is sometimes difficult because of legal and administrative separation of powers and responsibilities.

The Executive Committee of the International Association of Chiefs of Police in its report on the police chief executive (National Advisory Committee on Criminal Justice Standards and Goals, 1976:116) concluded:

> It is impossible for any one component of this system to meet the overall goal of crime prevention successfully. Each component must, therefore, be aware of the problems and needs of the other components. This knowledge cannot be gained internally, but must be obtained through communication with other components.

Beyond these commentaries and calls for greater cooperation, the literature on this issue provides little guidance. There is virtually no systematic analysis of the exact nature of the fragmentation. There is little analysis of the extent to which coordination and cooperation among component parts of the system can be improved without violating fundamental constitutional, legal, and ideological principles of government. There is a naive assumption that procedural and philosophical continuity throughout the criminal justice system is a desirable thing (contrary to what we have concluded in Chapter 3). Although it is usually noted that coordination and cooperation across organizational boundaries would be difficult, there is no systematic presentation of the mechanisms for achieving coordination and cooperation that are available. Finally, there is no analysis of the conditions necessary for such mechanisms to be established and operated to their maximum benefit. Typically the

advice is simply for somebody to get out there and start doing something. For instance, the Executive Committee of the International Association of Chiefs of Police (National Advisory Committee on Criminal Justice Standards and Goals, 1976:17) recommends:

> Police chief executives actively should initiate or encourage interactions with their counterparts in other components of the system. If a police chief executive waits for some other person to get the system working together, it probably will never happen.

The balance of Part II of this report addresses each of the above issues as it affects the the police-prosecutor relationship. The present chapter addresses the division of labor among police and prosecutors and the determinants of that division. Chapter 5 examines the mechanisms of coordination and cooperation that exist and a description of their operation and success. Chapter 6 describes the necessary condition for cooperation between police and prosecutors, namely, trust.

b. <u>The Division of Labor: Its Advantages and Disadvantages</u>

The principle of the division of labor simultaneously constitutes the major strength and the major weakness of any large scale social organization. By dividing a complex task into subtasks and distributing them among subunits of the larger system it is possible to achieve economies of specialization of expertise, of routinization of tasks, and of the bringing to bear on one goal the separate efforts of many different people. Only after man discovered this principle were his early monumental achievements made, such as the building of the pyramids and the

central administration of far-flung empires (Lenski, 197). However, while the division of labor makes it possible to accomplish tasks beyond the capacity of a single individual working alone, it requires something that the lone worker does not need, namely, coordination and cooperation among workers. As with a machine, the efficiency of a large-scale social organization is related to the degree to which the component parts are properly articulated.

The fact that subtasks are distributed among separate units of an organization makes coordination essential but difficult. No one person has full control of a task from beginning to end. Therefore unless people working on an early stage of a task do what is needed by the people "downstream" who are supposed to complete the task the overall will not be effectively completed. Also, responsibility is diffuse, people at one stage in the process may pass work along to the next rather than assuming the responsibility for and burden of completing it at their stage. Also, conflict and competition as opposed to cooperation and coordination between the subgroups can be engendered. In summarizing the organizational research literature on these negative consequences of the division of labor, Katz and Kahn (1966:65) identify a problem common to all organizations which is fundamental to the understanding of the police-prosecutor relationship. They write:

> The tendency of any group of people occupying a given segment of an organization is to exaggerate the importance of their function and to fail to grasp the basic functions of the larger whole. Some of this may be offensive, and some of it is related to circumscribed visible horizons . . . . Loyalties develop to

one's own organizational sector rather than to the overall organization. Conflict between departments can become bitter and persistent because the members of each do not accept common organizational objectives but only the specific tasks which comprise their daily lives.

Each of the advantages and disadvantages of the division of labor applies to the criminal justice system. Detecting, apprehending, prosecuting, judging, and correcting criminals is an enormous task which could not be done efficiently by any one person. Dividing these tasks among police, prosecutors, and the other agencies of justice achieves the efficiencies of specialization but creates problems in coordination and cooperation. Those problems of coordination and cooperation which occur specifically between police and prosecutors have been reported by several studies. McIntyre (1975:201) reported:

> "When I asked prosecutors and police chiefs about cooperation and coordination between their respective agencies . . . [they] would say that it was excellent, but, when pressed on the matter most would admit that the two offices seldom conferred on a business level and almost never socially . . . Further down the hierarchy . . . [p]atrolmen and trial assistants frequently spoke of the lack of any relationship."

Reiss (1967) found that 39% of the police in three cities felt the relationship between police and prosecutors could be improved. The National Commission on the Review of the National Policy Towards Gambling (1976:43) reported:

> "Prosecutor assistance to police in gambling investigations departments responding to the . . . survey said prosecutors never advise or assist during the investigation phase of gambling cases. Twenty-five percent said prosecutors become involved in half or more of their gambling investigations . . . . "

In their report on gambling law enforcement Fowler, et al.

(1977:44) concluded:

> "Improved coordination between police and prosecutor . . . would be an important step towards relieving the police discontent in achieving a set of goals. [In only two of the seventeen cities studied did the police and prosecutors work together on all gambling cases.] For the rest of the cities there was little evidence of joint effort or even close coordination."

In their study of narcotics enforcement in six jurisdictions, Williams, et. al. (1979:181) reported that

> "[one] of the most common problems . . . is the lack of coordination of law enforcement activities within the local departments with other departments in the local area [and with the local prosecutor's office]."

In their survey of rape law enforcement Brodyaga et. al. (1975:23) found:

> ". . . successful prosecution of any case depends on effective coordination between police and prosecutor . . . in at least three important areas: investigation and collection of evidence, founding of a complaint, and policy testimony and court proceedings. Very few [prosecutors' offices] surveyed and developed cooperative relationships with the police in all three areas.[19]

This ubiquitous lack of coordination and cooperation among police and prosecutors can be understood in part in terms of typical problems which occur in large-scale social organizations. One fundamental problem is that of "circumscribed visible horizons." That is, rather than developing a "downstream"

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19 But see the Battelle surveys (1977a and 1977b) which found reports from police and prosecutors of generally quite positive estimates of cooperation between them with regard to rape cases. This discrepancy between the Battelle and the Brodyaga findings are probably due to a methodological bias. As McIntrye (1975) reported and as we can confirm you get one answer to your initial inquiry and a different answer when you begin to probe the matter.

understanding of the case-information requirements at trial police and even prosecutors working in initial screening. Only evaluate cases in terms of meeting the immediate needs of satisfying the arrest and charging standards. Another problem is that police and other people working "upstream" in the process (such as prosecutors and judges handling initial proceedings) do not take it upon themselves to complete the work and terminate cases. Rather they send them through the system for somebody to dispose of later. Thirdly, the problem of each subgroup (patrol officers, detectives, and prosecutors) developing an exaggerated opinion of its value in the overall process is common.

The lack of a downstream orientation among criminal justice actors results from the horizontal fragmentation of the work of detecting, arresting, charging, and trying (or negotiating) cases. The problem occurs not only between the police and prosecutor organizations but also within them. For example, detectives need to get information from patrolmen but often do not get as much as they would like because patrolmen are not anticipating what an detective needs. In prosecutors' offices a common problem is that the prosecutors at initial screening are not strict enough in their case reviews. For various reasons (frequently involving police pressures) they accept weak cases which have to be weeded out later. Some prosecutors' offices have tried to prevent this by putting assistants with trial experience into their initial screening units. That cured the problem of the lack of knowledge about downstream needs but it did not sufficiently solve the problem of incentive to terminate

non-meritous cases as early as possible. The latter was achieved by additional policies requiring that the prosecutor who accepts a case must either try it or accept responsibility for it if it has to be plea bargained or dismissed.[20]

Among the police the lack of downstream-orientedness is the essence of being arrest-oriented as opposed to conviction-oriented. If the police are to acquire and maintain a downstream orientation they will have to adopt policies similar to the prosecution policies just mentioned. That means providing them with knowledge about what happens downstream and holding them responsible in some way for it. They need experience at trial (and in plea negotiations) to appreciate how unfinished business in the early stages of the process affects the work at the later stages. The change in perspective that comes about once a police officer learns what the prosecutor's needs are and is given responsibility for assuring they are met is illustrated by the transformation that occurred in a police sergeant in jurisdiction 12 when he was reassigned from patrol to the job of police-prosecutor liaison. Previously he like other patrol officers had had very little contact with the prosecutor's office. Now he was responsible for assuring that policework met the needs of that office. Within two months of daily contact with prosecutors he had developed a downstream orientation, as indicated by his response to our question about what the prosecutor's office would

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20 This arrangement presents some logistical and staffing difficulties but where it has been tried it has been regarded as a success.

say about the quality of police reports in his jurisdiction. He replied:

> "The prosecutor would say that the quality of the reports is not as good as it could be. And sometimes the prosecutor would be right about this. When I was a sergeant on patrol I approved reports without attention to follow-up. I would just see if there was probable cause present. I now look at cases as a screening officer. I look at it differently. Now the cases that I approved in the past I would not approve today. I used to approve as a sergeant cases knowing in my mind that there would be somebody else to check the case again and I didn't have to make a final check on it."

The difference between an arrest and a conviction orientation and the extent to which this sergeant adopted the latter is indicated by the kind of memos he now writes to officers regarding the deficiencies in their cases. One such memo choosen at random is reproduced below.[3]

Illustration #4.1

This is no big thing, but I thought you would like to see what I consider a good example of a report that makes it difficult to follow up. I noted the following area in the attached.

1. As to the suspect vehicle - there is no description of the vehicle provided. There is no indication of the vehicles location. There is no indication of the disposition of the surveillance conducted.

2. As to Witness #1. - 247 Villa Terrace is a rooming house w/o a mail box, there is no indication in the report as to which of at least three apartments is occupied by the witness. There is no hint as to how to recontact this witness, i.e. place of employment, work phone, residence phone.

3. As to Witness #2 - The same as to witness #1 and we don't even know how old this one is.

4. As to the suspect - No indication as to what, if anything, was done to locate him, i.e., TT's BOL's etc.

5. As to the top of p. 3 - Do you really think "S-1". ". . . gave the following account . . ."?

6. Additionally there is no indication that I can find as to the crime scene, i.e. photos taken, evidence observed, blood, wood ?????

Like I say, this is no particular big deal, it just slows down and complicates the follow-up of something like this.

In the absence of a downstream view, each subgroup in the process concentrates on its part of the process and quickly develops an exaggerated opinion of its value. When two such groups interact conflict occurs because neither shares the high opinion the other one has of its value to overall process. In some cases this has led to fist fights and open hostilities between individual police and prosecutors at the initial charging stage. More generally it leads to resentment and reduced cooperation.

In order to assess the extent to which these conflicts and other inefficiencies in the police prosecutor relationship represent "deliberate sacrifices" made to preserve "local autonomy and personal freedom" as opposed to unintended sacrifices which might be eliminated or minimized, it is essential to examine the division of labor between these organizations in depth. The balance

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21 Also noteworthy in the memo is his effort to be tactful and avoid the appearance of criticism by repeatedly emphasizing that "this is no big thing."

of our report does this using three complementary perspectives. This chapter and the rest of Part II of the report describe the general outlines of that division of labor as well as the mechanisms of and the conditions for the coordination and cooperation among these organizations. Part III focuses on the division of labor between police and prosecutors in regard to specific stages in the justice process and in regard to three subprocesses, namely, investigation, charging and plea bargaining. Part IV focuses on the core technology of the criminal justice process (i.e., the skills, knowledge and activities related to information processing) and shows how the work of this core technology is divided between police and prosecutors.

c. The Domains of Police and Prosecutors

Conventional discussions of the division of labor in the justice system usually explain that division by reference to the "roles" (sometimes "functions") of the police and the prosecutor. Typically these references are to the formal, civic-book definitions of the work of these agencies (e.g., American Bar Association, 1979; and, American Bar Association, 1980.) Other discussions use metaphorical language, for example, the police and described as the "front end of the funnel of justice"; or the "engine that drives the machinery of justice." The prosecutor has been described as the "chief law enforcement officer" in his jurisdiction (American Bar Association, 1970). One point that has repeatedly been made in these discussions is that in contrast to the supposedly well-defined role of the police, the role of

the prosecutor is ambiguous, multi-faceted and unclear. Some commentators have even identified this ambiguity as a main cause of problems in the administration of justice. In 1931 the Wickersham Commission (U.S. National Commission on Law Observance and Enforcement, 1931:16) noted that:

> ". . . the American public prosecutor besides the function of preparing criminal cases for trial and trying them in the courts has what is substantially a magisterial function of determining what offenses shall be prosecuted and what prosecutions shall be proceeded with . . . and also a function of general criminal detection and investigation."

The Commission concluded:

> "No good results can come from having the prosecutor's office overlap the functions of the police at one end and those of magistrates at the other" (ibid.:18).

By the 1950's the situation had not changed and Tappan (1960:342) wrote:

> "An important part of the difficulty involved in the prosecution of crime lies in the inconsistent definition of the prosecutor's role."

A decade later LaFave (1965:515) was still making the same point but added additional observations as to alternative roles prosecutors might plan and the conditions under which they would play them. He stated:

> "Appraisal of the role of the prosecutor is made difficult because that role is inevitably more ambiguous than that of the police or the trial court. The prosecutor . . . may conceive of his principal responsibility in a number of different ways. He may serve primarily as trial counsel for the police department, reflecting the views of the department in his court representation. Or he may serve as a sort of 'house counsel' for the police, giving legal advice to the department on how to develop enforcement practices which will withstand challenge in court. On the other hand, the prosecutor may consider himself primarily a representative of the court, with the responsibility for enforcing rules designed to control police prac-

> tices and perhaps otherwise acting for the benefit of persons who are being proceeded against. Another possibility is that the prosecutor an an elected official (while the police are increasingly appointive and the judiciary is incresingly insulated from political pressures), will try primarily to reflect community opinion in the making of decisions as to whether to prosecute. The uncertainty as to whether the prosecutor is responsible for all these tasks, and as to which is his primary responsibility creates difficult problems in the current administration."

Most recently, Jacoby (1980) echoed the familiar refrain with the title of her book, The American Prosecutor: A Search for Identity.

These descriptions of the roles of police and prosecutors are useful but limited in three important respects. They do not adequately identify the nature of the underlying work that police and prosecutors are engaged in (which we have identified as information processing, see Part IV). They have a tendency to lead into non-constructive debates over such things as what the essence of the role is and whether the prosecutor is really the "chief law enforcement officer" in a jurisdiction. Thirdly, they convey a static quality to the nature of the roles involved, as if those roles were fixed in time. In order to avoid these difficulties we (McDonald, 1979) have found it useful to replace the concept of "role" with that of "domain" as developed in the organizational literature (see, Thompson, 1967:26). That literature has shown that each organization in an industry establishes some niche, some boundaries around the total effort for which that organization lays claim to as its territory.[22]

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[22] For instance, Levine and White (1961) reported that among
(Footnote continued)

The notion of domain is particularly useful in analyzing the police-prosecutor relationship because it not only allows one to take account of the wide variations in the division of labor that exists among jurisdictions but also provides a conceptual framework for dealing with the dynamic quality of those domains. Within specific jurisdictions shifts in domain occur as the result of power struggles, legal decisions, financial crunches, and other factors. At the more general level, one can detect a broad historical trend in the changing domains of the police and prosecutor. A general analysis of these domains is provided below. More detailed analyses are provided in Parts III and IV of the report.

The domains that police and prosecutor agencies stake out revolve around three separate interrelated kinds of "territory": (a) the stages of the criminal justice process; (b) the subprocesses of justice (e.g., investigation, charging, and plea bargaining, which are generally related to certain stages in the process but may operate over several; and (c) certain ancillary tasks and services, such as, transporting physical evidence to regional forensic laboratories; notifying witnesses of trial dates; etc. The general division of labor between the police prosecutors in the administration of justice is that the police control the suspicion and apprehension stages of the process and

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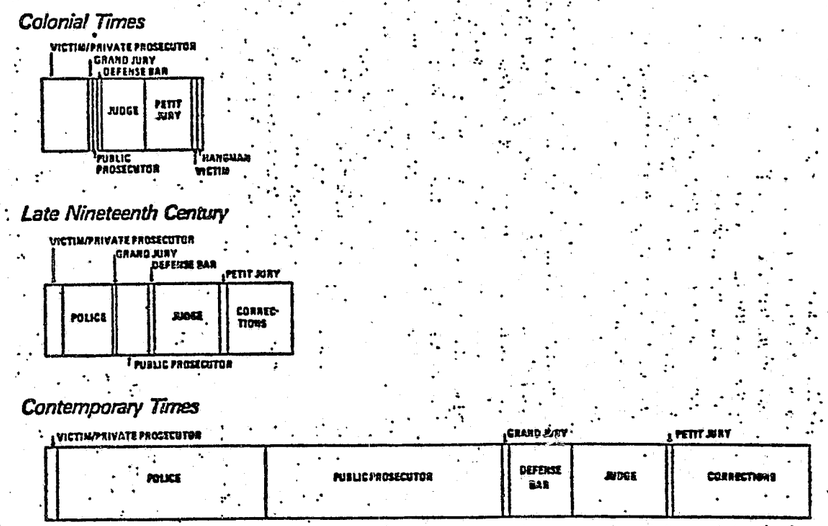
22(continued)
health agencies in a community domain consisted of claims each organization staked out for itself in terms of the diseases covered, the population served, and the service rendered.

prosecutors control the charging and post-charging/pretrial stages. The police control the investigation process while the prosecutor largely controls the plea negotiation process; and both jointly control the charging process. However, this picture of the division of labor between police and prosecutors should be regarded as a snapshot which freezes one moment in time. In reality the domains of the police and prosecutors have been evolving since the last century and are continuing to change (see Figure 4.1). The main direction of this change has been for the prosecutor's office to move up to the beginning of the charging stage of the process and to assume the role of chief manager and conservator of increasingly more limited criminal justice system resources. This change is still occurring in many jurisdictions and is commonly resisted by the police because it is largely at the expense of territory that was once theirs.

The extent of this expansion of the prosecutor's domain, however, has not gone to its logical limit, namely, into control of the arrest decision. It has usually stopped at controlling the initial charging decision. Ordinarily prosecutors do not try to directly influence police decisions as to arrest policies and allocation of police law enforcement resources regarding which

Figure 4.1

EVOLUTION OF THE CRIMINAL JUSTICE PROCESS AND THE PUBLIC PROSECUTOR'S DOMAIN



crimes or which criminals should be targeted.[23] There is virtually no coordinated, police-prosecutor policy making regarding these issues. In shaping their new role as conservator of court resources, most prosecutors have not defined it as their responsibility to coordinate their policies with those of the police or to try to directly influence the police in shaping police policies regarding the number and type of arrests made. However, in a few of the larger cities the chief prosecutors have begun to try to influence these police decisions. As other jurisdictions increase in size and additional strains are placed on limited court resources, more prosecutors are likely to adopt similar measures.

With regard to the investigative function, the domains of police and prosecutor overlap, at least in theory. Prosecutors have an investigative responsibility under law (see, e.g., State v. Winne, 12 N.J. 152, 96 A. 63 [1953]). They have an ethical duty to investigate suspected illegal activities when it is not adequately dealt with by other agencies (American Bar Association, 1971:30); and they have investigative staffs. Yet, the investigative function as a whole remains almost entirely with the police. Except for special prosecutorial investigative units in a few large cities, there has been no major expansion of the prosecutor's office into this traditional police domain. In contrast to the clear efforts of prosecutors to take control of

23 Occasionally prosecutors take actions to get the police to shift their arrest strategies (e.g., Kamen and Weiser, 1981). But, these are exceptional actions.

the initial charging process away from the police, there is no similar effort to usurp the investigative function from them. The investigative staffs of prosecutor's offices have generally not been expanded dramatically. The Alameda County (California) District Attorney's Office is probably typical of many offices in this respect. Between 1933 and 1963 it expanded its investigative staff from 8 to 12 officers (Skolnick, 1966:263).—Roscoe Pound's description of the negligible investigative role of the Cleveland (Ohio) prosecutor's office in 1922 continues to be a reasonably accurate discription of that role today. He wrote (1922:169):

> "In general, the prosecuting attorney and his assistants take no part in the investigation of the crime or the molding of the proof. He has no machinery, other than his busy assistants and the single county detective or generally utility man, for detection of the offender or discovery of proof. He has no facilities for modern methods of criminal investigation. He pits his unpreparedness with such assistance as he may obtain from the police department, against the carefully prepared case of the defense attorney. He takes the proof and the way it has been prepared by the police . . . , making the best of what he gets, or, in more serious cases, attempting to remedy the defects or omissions."

The failure of prosecutors to develop a larger role in the investigative process is to the detriment of the system because the police need and want the advice and direction of the prosecutor in the investigative process (for instance, in matters of writing proper search and arrest warrants, the propriety of using informants, and the making of certain deals and the importance of getting certain evidence). In many jurisdictions the prosecutors have not concerned themselves with these matters on a systematic

basis. Individual issues either go neglected or are dealt with on an ad hoc basis, usually after disaster has struck. In the wake of such incidents prosecutors will complain that the police should have checked with them first; and the police will counter that prosecutors are too inaccessible, disinterested or unreliable.

Some of these kinds of incidents could be prevented if clearer lines of responsibility were jointly established. But to do so assumes a climate of trust and willingness among chief executives of each agency to grapple with sensitive issues. Two less desirable but more feasible interim substitutes or supplements are: (1) for prosecutors to be available to the police at least by phone at all times; (2) and providing means by which police and prosecutors can develop person-to-person contacts with each other in the course of processing cases so that informal social/professional relationships can develop. In many jurisdictions these informal networks are the main means of inter-organizational cooperation and advice. However, they should be encouraged but not allowed to substitute for or subvert formal mechanisms of coordination.

The main exceptions to the general pattern of prosecutorial non-involvement in the investigative function are: investigations by the prosecutor's own investigative staff; special investigative strike or task forces; and an increasing trend among prosecutors to make their offices available to the police at all times at least by telephone. Each of these types of involvements has its problems but none critical.

The prosecutor's own investigative staffs are for the most part not used in the preliminary or early follow-up stages of investigations. They are used primarily for tracking down witnesses (80% to 90% of their time). They are also used for putting last minute touches on cases and occasionally for re-investigating an entire case. These activities are often misunderstood and resented by the local police who worry about the prosecutor trying to put them out of business and resent the implied criticism of their work. In reality prosecutors are not interested in taking the initial and early follow-up investigative process away from the police. They would like the police to reduce the need for prosecutorial investigators by doing a better job of anticipating the prosecutor's needs.

Special task forces focusing on rackets, vice, drugs and economic crimes involve prosecutors directly in the investigation process from the outset--usually in joint efforts with the police. Two problems in connection with such units typically occur. One is the question of who makes the important overall choice of targets of the investigations, something that usually seems to go to the prosecutor. The other is the question of who controls the actual investigation of specific cases. The latter problem frequently involves both police and prosecutors stepping on each other's toes by trying to play the other's role. The unwritten division of labor that many such units have arrived at is that the prosecutor's job is to determine what information is needed and whether certain tactics in obtaining it are legal. The police officer's job is to know how to get the information.

This same problem of blurring of roles occurs in those jurisdictions where prosecutors respond to the scenes of crimes or arrests. There too the same solution has been worked out but only on an individual basis. Future units could avoid this common problem if this solution were made known in advance.

With regard to the various ancillary services and tasks related to the processing of cases, neither the police nor the prosecutor wants to assume costly additional functions which the other organization has performed in the past. Such functions include: the maintenance of arrest record files; the operation of forensic laboratories; the management of witness notification and rescheduling; the warehousing of physical evidence; and even the obtaining of estimates of the value of stolen property. In these times of dwindling budgets the struggle between police and prosecutors over these matters is usually over divestment rather than encroachment of domain. Each agency wants the other to assume control of these tasks and responsibility for their associated costs. For instance, in jurisdiction 7 a court decision required that people used in line-ups must resemble the suspects more closely than in the past. This resulted in a major increase in the cost of operating line-ups. Citizens had to be found transported, fed and paid for their assistance. At first the police tried to make the prosecutor absorb these costs; but he quickly recognized what was happening and refused to accept cases without the line-up being done. Some of the conflicts over the division of labor regarding these small scale matters arise out of unanticipated ambiguities in the local division of responsi-

bility for such matters. Typical of this is the question of who has responsibility for the police unit that has been assigned to work in the prosecutor's office; or which agency will have to pay the cost of transporting witnesses subpoenaed from long distances. Most of these matters are things which could be worked out in advance in a formal understanding between the agencies. But typically this has not been done.

CHAPTER 5, MECHANISMS OF COORDINATION AND COOPERATION BETWEEN POLICE AND PROSECUTORS

A. The Central Issue

Everywhere one hears calls for greater cooperation and coordination between police and prosecutors.[24] But what has been lacking is a systematic exposition of the various mechanisms of cooperation and coordination that have been or might be used.[25] This chapter remedies that omission. It describes the variety of mechanisms available for achieving better cooperation and coordination between police and prosecutors' and, where possible, it presents evidence or judgments as to the effectiveness of them. The next chapter will deal with the necessary condition for cooperation, namely, trust between the agencies. The analysis draws on the literature on inter-organizational relations (see generally, Evan, 1978). A central concern is the question, "How do organizations which are separate, autonomous and not subject to a central, hierarchical authority, manage to work together at some common purpose even though they may simultaneously be competing and conflicting with each other?"

Our discussion begins with a general description of the differences in the degree of cooperation, coordination, integration between police and prosecutors among different

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24 See Chapter 4.

25 But see, Feeley and Lazerson (1980) who have made a good initial effort at cataloguing some of these mechanisms. However, their analysis needs to be refined and filled out with empirical evidence.

jurisdiction.

B. A Continuum of Coordination and Cooperation

The differences in the degree of organizational interdependence between police and prosecutors and the coordination and cooperation that flows from it can be conceived of as lying along a continuum. At one extreme is the jurisdiction where a cold-war arrangement occurs in which each organization goes its own way but keeps a watchful eye on the other organization. Interactions are kept to the minimum necessary to transact the business they have in common, i.e., the processing of cases. Typically this means interaction occurs only between the rank and file members of each organization. Obviously total isolation of the two organizations is not possible otherwise no cases would be processed at all. But, the cold-war arrangement is as close to total non-cooperation, non-coordination, and absolute indifference as one can get. In some jurisdictions this arrangement is encouraged by the nature of the local criminal procedure and the fact that the prosecutor has a minimal (or non-existent) presence in the early part of the charging process. But a more important factor seems to be the conviction on the part of either one or both organizations that the other is fundamentally worthless for reasons of corruption, laziness, ineptitude, sincere misguideness, or some other unfathomable reason.

In jurisdiction 1 this arrangement had existed under the previous prosecutor's administration. During his administration the police had resigned themselves to poor, incompetent, and corrupt work from the prosecutor's office. The police "knew"

that cases were fixed; that certain defense attorneys could get anything they wanted; and that a defendant's social standing in the community weighed more heavily than the strength of the case or the seriousness of the crime as a factor in prosecutorial decision making. They also "knew" that if they had sensitive undercover operations they had to hide them from the prosecutor's office; that if they needed legal advice they had to seek it elsewhere; and that if they got in trouble they could expect no help from the prosecutor. They also recognized there was nothing they could do about it except wait for the next election and either hope for or work for the prosecutor's defeat.

At the other extreme of cooperation and coordination between two organizations is the merger. To achieve maximum coordination one organization incorporates the other. While there are no examples of complete mergers between police and prosecutors, there are notable examples of partial "mergers." The first is illustrated by those large urban jurisdictions where a substantial number of police officers have been detailed to work as investigators for the prosecutor's office. The second is merely a special version of the first. It refers to the special units of police and prosecutors working together in strike forces against narcotics, organized crime, white collar crime and "sting" operations. These units typically consist of police and prosecutors working on a target of limited focus. Several jurisdictions we visited had such programs and despite occasional instances of minor stepping on each other's toes, the degree of coordination and cooperation between police and prosecutors in

such units was almost always higher than that which occurred elsewhere in the jurisdiction.

Between the extremes of almost no interaction and total merger, there are jurisdictions with varying degrees of organizational interdependence between police and prosecutors. Although we did not attempt to do so, future research might attempt to conceptualize this variable in terms of the density of the relationship between police and prosecutors and operationalize it along multiple dimensions of interaction and coordination including but not limited to the following dimensions: (a) degree of contact between command-level representatives of each organization; (b) degree of contact between rank and file members of each organization; (c) degree of interface between existing computer systems; (d) the amount of paperwork exchanged in processing cases; (e) the amount of other written communications including newsletters, memos, advisory opinions, etc.; (f) the number of joint strike forces or special investigating units; (g) the degree of participation in each other's training programs; (h) the presence of on-call systems; (i) the degree to which policies have been jointly formed or reviewed. We would hypothesize that as the density of the relationship increases the quality of justice in the jurisdiction should also increase.

C. Mechanisms of Coodination and Cooperation

There are three broad institutions of coordinating the joint effort of separate and autonomous organizations: (a) informal structures; (b) exchange relationships; and (c) formal coordinating mechanisms. Each of these broad institutions takes a variety

of specific forms which are discussed below.

1. Informal Structures

Typically the best single indicator of the overall degree of harmony (as distinct from cooperation, coordination, and efficiency) between police and prosecutors was whether they engaged in any social interactions beyond strictly business exchanges. If they lunched together or drank together or competed with each other in amateur sports leagues, there was much higher likelihood that the overall operation of the two organizations was harmonious. Where informal structures based on ties of professional colleagueship and camaraderie between police and prosecutors occur, the degree of conflict between the two organizations tends to lower and when conflict occurs it appears to be more easily resolved. However, it must be noted that harmonious relationships are not necessarily desirable in themselves. They are not synonymous with well-coordinated relationships nor are they always in the interest of justice. Here the distinction between personal and organizational levels of analysis is important. The individual members of each agency may enjoy working together but the organizational arrangements under which they operate may not be well-coordinated or efficient and each member may become co-opted by the other.

ILLUSTRATION # 5.1

In jurisdiction 1 the harmonious relations between police and prosecutors were fostered by an on-call system whereby the prosecutors responded to crime scenes and arrest scenes at the request of the police to give legal advice. However, the jurisdiction was in the opinion of the chief prosecutor terribly inefficient in processing cases because as the result of local custom and law the prosecutor did not review

cases until they reached the grand jury. In fact, the prosecutor was preparing the way for eventually taking over the initial charging function. But he was moving slowly because he knew the police opposed such a move and he did not want to lose the harmony and good will he had achieved.

ILLUSTRATION # 5.2

In jurisdiction 8 an assistant prosecutor who had participated in a project which put prosecutors in the police station to advise them on the arrest and charging decisions reported that he and his fellow prosecutors developed enjoyable social ties with the police. "They always brought me something back to eat when they took a break." But this prosecutor also noted that in a few months he and his colleagues had been "completely co-opted by the police."

The fear of co-optation was cited by several prosecutors as an important reason for deliberately keeping a certain degree of aloofness and distance between themselves and the police. They feel this detachment is necessary for all prosecutors in order to protect the judicial aspect of the prosecutor's role. Inasmuch as prosecutors have the duty "to seek justice not merely to convict" (American Bar Association, 1970, paragraph 1.1(c)) they need to maintain their objectivity, neutrality and impartiality to the extent possible. For this reason, all proposals for programs that might lead to better cooperation and coordination among police and prosecutors must be evaluated against the possibility of their undermining the prosecutor's impartiality in dealing with the police. As one experienced prosecutor noted, the heated battles between police and prosecutor reported are healthy indications that all is well with the system of checks and balances in those jurisdictions. In his opinion there is no stronger force for getting an agency of justice to act than the

criticism of another agency; nor is there any greater assurance of the impartiality of justice than a healthy degree of antagonism between police and prosecutors.

Notwithstanding these concerns about co-optation, a certain degree of informal social structure based on friendship ties between police and prosecutors appears to be beneficial and desirable as a means of achieving coordination and cooperation between those agencies. In some jurisdictions such ties are the only mechanisms of coordination. Trial prosecutors depend on their friendships with detectives to get necessary follow-up investigations done. Middle-management personnel are able to call on their counterparts in the other organization to settle problems. Even at the executive levels in some jurisdictions coordination and cooperation depend upon the friendship ties between the officials. Typically where this happens the social ties were established between the specific officials at a prior time under different circumstances. While these relationships were sustained over time, they were specific to the individuals involved and not expandable or transferable to others or to the whole organization. Thus with personnel turnover these ties are lost and the lines of communication broken. In several such examples (jurisdictions 10 and 1) the social ties were due to the fact that the prosecutor (or his executive assistant) had once been a police officer in the same jurisdiction. When he became the chief prosecutor he was still able to call on his old friends in the police department. But these ties die out. In jurisdiction 10 the prosecutor said he was quickly losing access

to the local police command because his old friends were retiring.

2. Exchange Relations

A second approach to understanding cooperation between organizations is to look for exchanges between them (Levine and White, 1960; Evan, 1978). Exchange is conceived of here in the broadest sense as every case of a voluntary agreement involving the offer of any sort of present, continuing, or future utility for utilities of any sort offered in return. The utility may be anything of value, material or non-material including prestige and public image.

Feeley and Lazerson (1980) dismiss this approach as a means for analyzing police-prosecutor relations because exchange analysis is most applicable when the cooperative behavior to be understood involves voluntary behavior and joint decision making. In their opinion this rarely occurs in the police-prosecutor relationship. In contrast, Cole (1973) makes exchange theory the heart of his analysis of police-prosecutor relations. We would agree with Cole. The exchange framework is a useful device for "making sense" of numerous interactions between police and prosecutors which sometimes increase cooperation and sometimes decrease it.

Many exchanges between police and prosecutors are voluntary (in the sense that they are over and above the required work that they must do in processing cases); and for the most part they do not involve direct exchanges of money, material or resources. The exceptions to the latter are those cases where one organi-

zation devotes some of its resources to directly supporting the work of the other organization (such as police squads detailed to the prosecutor's office as detectives or prosecutors detailed to the police department either as part-time instructors or as case review officials.) One common exchange is "taking the heat for" or "giving the heat to" the other organization.

ILLUSTRATION # 5.3

> In one jurisdiction the newspapers were filled with reports that the police had employed an ex-cop who they knew had been fired from another city for lying. He was used in undercover narcotics investigations. Among other things this discovery meant that the prosecutor had to dismiss several dozen pending cases which would have had to rely on that ex-cop's testimony. When the prosecutor was asked by the press about the dismissals, he laid all the blame on the police. He explained to us that it was an election year for him and he had taken the head for police "screw-ups" in the past and they could take the heat for him now.

Other common exchanges are: (a) accepting weak cases just to "get along" with the police; (b) plea bargaining cases that the police "screw-up" (by losing evidence or failing to notify defendants of their rights); (c) making good on promises police made to defendants for information or services; (d) making favorable comments ("atta-boys")on feedback forms to the police; (e) coming to the defense of the other organization either in the press or at trial (e.g., protecting the police officer from abusive cross-examinations); (f) extending "professional courtesies" such as notifying the police of a schedule change or asking each other for one' opinions, or allowing each other to use one's office facilities. One of the things of value being exchanged in several of these interactions is the public image

and honor of the other organization or its members. One of the things that is being purchased by the exchange is harmony between the organizations for the present and credit for future protection of one's own image.

3. Formal Coordinating Mechamisms

There are a variety of formal mechanisms for enhancing the cooperation and coordination between police and prosecutors. The more important of these are discussed below.

a. Coordinating Councils

It has been recommended that "coordinating councils" with representatives of police, prosecutor and other justice and governmental agencies should be established and should have a professional staff available to them (National Advisory Committee on Criminal Justice Standards and Goals, 1973b:§ 4.1). It was hoped that this council would serve as a sort of supra-agency coordinating the efforts of the component parts of the system. Nowhere did we find such a "coordinating council." But, several jurisdictions have developed more limited, less ambitious versions of such structures. Typically they consisted of a law enforcement council or the local association of chiefs of police (to which the prosecutor was magnanimously invited). These councils would meet at regular intervals (monthly, or semi-annually) for lunch and general discussion of common concerns. However, while these gatherings seemed to be an important method of opening lines of direct personal communication between executive level police and prosecutors, they did not appear to be used for any direct, coordinated policy-planning or conflict-

resolution. Perhaps these latter activities could not be done in such sessions because so many people were present at one time. But for whatever reason police chiefs and prosecutors who attended them reported that their primary value is more in the good will and openness they create then in their ability to directly settle disputes or set policies. The level of discussion at these gatherings usually remained at a light exchange of pleasantries. Direct action was taken only on issues where there was unanimous agreement. As one police chief said, "We always leave slapping each other on the back and saying how we're both on the same side."

In contrast, in Detroit an unusual police-prosecutor coordinating council has been jointly established between the Detroit Police Department and the Wayne County Prosecutor's Office (Detroit Recorder's Court Division). This is not a "coordinating council" in the sense of consisting of representatives of several organizations and a permanent staff. Nor is it just a police-prosecutor "liaison" unit designed to merely transfer cases and handle scheduling problems.[26] Rather it consists of executive-level (second-in-command and other officials) and a few middle command-level representatives from each organization. Neither chief executive attends the bi-monthly meetings. Both sides agree that this is for the best because these meetings get down to tough criticisms of each other's performance and policies. Occasionally harsh words are

26 A separate such unit exists in Detroit.

exchanged and some grand-standing goes on. But since the chief executives are not present the conflicts do not become translated into personal and political struggles between them. Deadlocks can be resolved without losing face on the basis of "having to check with one's boss." This ploy allows for cooling off time when impasses are reached thereby making it easier to come up with compromise positions.

Actually, recourse to such tactics is infrequent. Usually the members of the group work out their differences. However, even in this work group where candor is the rule, the types f issues addressed and policies set are of fairly limited scope. They do not address overall law enforcement/criminal justice planning regarding such questions as: how many arrests should be made per year; what types of criminals should be targeted; or what proportion of criminal justice resources should be devoted to specific criminal justice problems. The operation of the unit and the types of issues it does address can be seen from the field notes below:

ILLUSTRATION # 5.4

> The day we observed the meeting of the police-prosecutor coordinating council the discussion was amicable but serious. The deputy chief of police requested of the principal assistant prosecutor that the prosecutor's office develop a policy of charging certain offenders with certain offenses. The problem was that there had been a series of incidents where defendants in the holding cell operated by the police deliberately destroyed the cell's plumbing fixtures and furnishings. Damages and repairs cost over $100 and were an administrative nuisance. The police had tried to add charges of malicious destruction of property to the pending cases against the defendants. Some of the assistant prosecutors had gone along with this but one recently announced that the office would no longer do so. The police felt the charges should be added

otherwise there would be no way to prevent the damage from continuing. The principal assistant prosecutor said he did not think felony charges would be appropriate but he would take the matter under advisement. Thinking out loud he said he recognized the legitimate police interest at stake but worried about complicating cases with additional charges which may make no difference in the sentence or the outcome.

In the end both sides seemed satisfied. But two weeks earlier there had been an explosion at the meeting. Both sides were mad over a specific case where a prosecutor had subpoenaed a police detective to court on his day off just to have him "assist" with the prosecution of the case (not testify but sit with the prosecutor and advice). The trial prosecutor in the case had wanted all the help he could get because he regarded it as an important case. He had requested of the officer's superior permission to waive the police department's policy of sending a substitute officer to court when the principal officer has his day off. However, the prosecutor was unable to convince the supervisor of the importance of having the principal officer there. Unable at the last minute to appeal the supervisor's decision he had subpoenaed the officer.

The trial prosecutor's use of the subpoena was a challenge to the authority of the police command to set and maintain their departmental policies. They did not take the challenge lightly. They recognized that it had been a power play they could not tolerate. Having made this point and after some harsh exchanges, good will was reestablished and the prosecutors acknowledged that as a general practice they should not subvert such policies.

The value of a formal coordinating unit such as Detroit's is substantial even though it does not address the larger criminal justice policies issues. There are numerous small adjustments and readjustments that continually need to be made in the operation of large-scale organizations. Without such mechanisms of coordination they simply are not made and the system is adversely affected in numerous subtle, although perhaps cumulative, ways.[27]

b. Police-Prosecutor Liaison Programs

Another formal mechanism of coordination is the police-prosecutor liaison officer or program. These programs consist of one or more officers who are detailed to work with the prosecutor and the courts. A large variety of programs bear this name although they are not always the same in their functions. They range from simply having an officer who acts as a courier between the two offices (delivering cases and possibly bringing back requests for further investigations) to substantial programs which help coordinate the police appearances in court; and the preparation of police reports and searches for arrest records; and handle requests by the police for internal appeals of prosecutors' decisions. In several places where the "lazy-on" officer is a one-man operation, he has assumed an unofficial but highly valuable role as a boundary-spanning agent maintaining harmony between the two agencies, as illustrated below.

ILLUSTRATION # 5.5

In jurisdiction 3 the police-prosecutor liaison is a sergeant with over a decade of experience. He starts his day in the police station where he picks up all cases made by the police the preceding day and delivers them to the prosecutor's screening unit where he spends much of the rest of the day "on-call" to track down additional information.

His unofficial value comes in two ways. He and the prosecutors in the intake unit have found that when the prosecutor is going to reject cases brought in by police (from the other police departments in the jurisdiction that do not use a courier system) it is always easier to have the sergeant break the news to them. The same decision from a fellow police officer

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27 However, it might not be possible to establish quantitatively a link between the presence of such a unit and a measurable reduction in the crime rate or increase in the conviction rate.

is usually acceptable whereas it might provcke a confrontation if it came from the prosecutor directly.

The liaison officer's second unofficial harmonizing function comes through his role as a double agent, a spy in both camps. Both the police department and the prosecutor's office use him to find out what the other organization is thinking or feeling about the first. This communication role is especially important for the sergeant's own police department because the courier system effectively isolates the bulk of the police in that department from contact with the prosecutor's office.

c. Internal Appeal Procedures

As a gesture of good will and a method of solving case-specific (as opposed to broad policy) conflicts between police and prosecutors, several prosecutors' offices have established internal appeal procedures. Under these procedures police officers who disapprove of an assistant prosecutor's decision (usually a charging decision) may have the decision be reviewed by a supervising prosecutor. If the officer is still unsatisfied he may even pursue the matter all the way to the chief prosecutor. Typically the only cases that are appealed are ones where prosecutors refuse to add charges of "resisting arrest" or "assault on a police officer" in cases where defendants gave the police a hard time at arrest. Requests for review of these decisions and other cases virtually never reach the chief prosecutor.

These appeal procedures are a good-faith measure and do resolve some conflict. However, they should not be overrated as a major solution to local conflicts between police and prosecutors; nor should they be regarded as a major instrument for achieving coordination or cooperation. Rather they should be

thought of as a useful supplement to a larger plan for achieving such coordination.

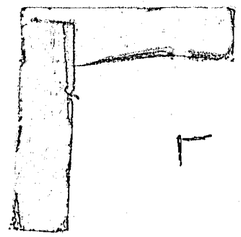
d. Intake Screening Units

Intake screening units wherein prosecutors review cases brought by the police are often points of considerable friction between those two agencies. But they are also important means of coordination. Like a clutch shifting from one gear to the next, these units coordinate the differences between the imperative of police work on the streets and the prosecutor's work in the courts. When these units involve interactions between individual police and prosecutors they serve to some extent to further the coordination and cooperation between the two organizations through the development of social ties and the swapping of informal feedback. (Of course, however, there is always the potential that these exchanges can become unpleasant and ultimately lead to uncooperative behavior.)

e. Formal Feedback Mechanisms

A major reason for the lack of coordination between components in a sequentially organized system is the lack of a "downstream" or a "system" orientation. This in turn is due in large measure to the lack of feedback on the downstream consequences of one's performance upstream. With regard to the police, this means that their lack of conviction orientedness is due in part to and is being perpetuated by their lack of effective feedback on case outcomes and the degree to which those outcomes are related to police performance.

The police say they want feedback and in theory it would be



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a useful thing to have. But, there are several problems involved in providing adequate, formal feedback from prosecutors to the police. The first involves the willingness of prosecutors to cooperate. That means establishing and maintaining some standardized set of procedures. A second problem has to do with the willingness of prosecutors to be candid and honest in evaluating the impact of police performance on case disposition decisions. There are several aspects to this problem. Some prosecutors do not want to criticize the police (except in extraordinary cases) because it may interfer with their working relationship with them. A command-level police administrator in jurisdiction 11, noted:

> "D.A.'s depend on detectives for information. They need them. Therefore, they feel they can't criticize them and say, for example, 'We lost the case due to police error'"

But some prosecutors are willing to criticize. One prosecutor who was a former policeman said that because of his police experience he could recognize bad, illegal, or unnecessarily forceful police behavior in cases brought to him by the police. He succeeded in getting several police officers fired for improper behavior. In reading their police reports he detected a pattern of consistently reporting that they had had to use force to subdue suspects. At first he had confronted the individual officers and told them he "knew" what was going on because he had been a cop himself. When they persisted he reported them to higher authorities and they were dismissed. He believes, however, that only a former cop could get away with that kind of

criticism of the police.

Aside from the unwillingness of some prosecutors to criticize the police, another obstacle to creating an effective feedback system is that some chief prosecutors are unwilling to commit themselves in writing to statements which could be used against them politically or legally. In jurisdiction 10, a command-level police administrator reported that the prosecutor's office:

> "used to have a structured feedback system. They no longer have it because, if the county attorney puts complaints in writing, this may result in law suits. The feedback form was designed by the police department and was performed at their request. Apparently the county attorney objected to putting his reasons for case rejection on paper."

In jurisdiction 11 a command-level police official stated:

> "The lack of feedback is intolerable. There has been a failure of the MCI section on police-prosecutor feedback. The D.A. is not corrupt. However, he won't let data out that will permit an analysis of the D.A.'s shop."

However, in other jurisdictions, especially ones with computerized management information systems prosecutors have been willing to report in writing their reasons for case outcomes. But these reasons are in the form of general reason codes. For example, they indicate that a case was rejected because of "insufficient evidence" or "witness unclear." Such feedback is better than nothing but it does not pinpoint the exact effect of the police work on the case outcome. Furthermore, it is unlikely that prosecutors would be willing to give such precise reasons for their actions. No prosecutor would want to put in writing that he gave away an extra two years in a plea negotiation

because the arresting officer has a reputation for exaggerating the truth.

Two other major obstacles to achieving effective formal feedback from policy to prosecution are: the logistics of distributing feedback to the appropriate people, and timeliness. The first problem involves getting feedback not only to the principal officer involved but also to their superiors and to the police high command where it can be used for management planning. Many jurisdictions rely on the old manual system of assigning a police officer to track down case dispositions. This system is hopelessly inadequate to meet the logistical demands of a comprehensive feedback system. It is unreliable; costly; does not get sufficient input from prosecutors; and is not sufficiently versatile in the form of its output. That is, it does not digest and analyze the material and present its data in ways readable to the individual officers involved or usable for management planning. Even where prosecutors participate in this manual system its value is limited--although the police rightly argue that it is better than nothing.

The new computerization of prosecutors' offices (with PROMIS and OBTS and other locally developed programs) has greatly reduced the logistical problems of tabulating and distributing case outcome and the reasons for it.[28] But it appeared that this

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28 One of the management packages developed by PROMIS for use by executive-level prosecutors would be quite suitable for managerial use by the police, see, Institute for Law and Social Research (1980) "PROMIS Management Report Package" in Promis System Transfer and Operations Manual, Vol. II, (Footnote continued)

technology is not yet being exploited by police administrators or line officers.

Another logistical problem is the degree of comprehensiveness of the feedback. The most comprehensive system would contain not only information on decisions but reasons for them for each of the many decisions points in the process including charging, grand jury, dismissal, plea bargaining, outcome at trial, and sentencing. Getting feedback on each of these decisions is a major logistical problem because the decisions are spread over time and location in the process.

In none of the 16 jurisdictions visited was there a comprehensive reliable feedback system from the police to the prosecutor. That is, in no jurisdiction are all case outcomes including sentence information and reasons for dispositions, communicated to all of the relevant police officers. In six jurisdictions (37%) no systematic feedback occurs at all; in 3 (19%) only detectives receive some feedback. In the remaining 7 jurisdictions (44%) both patrol and detectives receive partial feedback.

The extent of the partial feedback varies by jurisdiction. In jurisdiction 1 the feedback includes only information up to and including grand jury dispositions. In jurisdiction 2 police only get trial dispositions. In jurisdiction 12 police get prosecutors' charging decisions but no trial dispositions. In

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28 (continued)
Washington, D.C.

jurisdiction 8 the police are only informed of whether the case resulted in a guilty or not guilty outcome.

The results of our telephone survey in which we asked about feedback differed from what was found in the field visits. The telephone survey suggests that a substantial amount of "feedback" occurs. For instance, 68% of the responding police departments said that they receive reasons for case rejections at the prosecutor's initial charging decision; and 86% of the responding police departments said they get regular feedback on dismissals and whether cases plead guilty or go to trial. However the telephone results seem problemmatical because (a) prosecutors' offices in the same jurisdiction gave slightly different answers to the same questions (88% of the responding prosecutors' offices said they give reasons for case rejection and 69% of them reported that they regularly notify the police when cases are dismissed and whether or not cases are pled or go to trial); (b) because several respondents who said that feedback exists were apparently referring to informal, person-to-person feedback as opposed to written feedback; and (c) because our experience in the field was that when we asked command-level officials whether feedback systems were in operation we were frequently told they were; but when we asked detectives and patrolmen the same question the story was usually very different.

Even if it is true that there exists more formal feedback systems than our field visits suggest, our conclusion that the police are not getting effective feedback still stands. This is because the feedback received is in generalized categories

(rather than specific criticisms) but, more importantly, because it is not used! In jurisdictions which do have feedback it was usually ignored by both the line and command levels. This came as a surprise after all the police comments about how much they wanted feedback. In several jurisdictions that have either manual or computerized feedback systems the main breakdown in the system occurred within the police department! Neither line officers nor command-level officials bothered to use the existing feedback. In jurisdiction 2, a police liaison officer assigned to felony court reported that the police department is made aware of all superior court dispositions. The court sends a card by defendant's name to the department. But the police officer and the detective in the case generally do not get that information. The liaison officer merely adds the cards to the department's files. There is no notification of police error, although occasionally an unofficial comment may be passed back and forth. "The caseload is too high to give feedback," he explained.

In jurisdiction 14 case dispositions with reasons for the decisions are sent to the police department in every case by the prosecutor's victim/witness unit. We asked the captain of detectives to trace the distribution route taken by the feedback once it reaches the police department. He was unable to do so and was only vaguely aware of the existence of the feedback. He had to ask his secretary to track down the information--which she too was unable to do.

Thus the problem of feedback to the police appears to be not only a matter of getting cooperation from the prosecutor and

operating the necessary logistical system to supply that information, but also developing formats within managerial use of the information and motivating the police to use it.[29]

The last obstacle to effective formal feedback systems for the police is the matter of timeliness. In several jurisdictions where feedback does occur the police pointed out that the only useful feedback as far as the individual officer is concerned is information on the decisions made in the earliest stages of the process, particularly charging and early plea bargaining. They noted that it does little good to learn about ones mistakes a year or two after they are made. Feedback on cases that have been in the system for 6 to 18 months and finally go to trial or plea bargaining is of little corrective value (although not totally useless). The police officer may long since have moved to a different assignment, corrected his performance, or

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29 The failure of the police to capitalize on available feedback seems to be a form of the chicken-and-the-egg problem. Because the police have not been conviction-oriented in the past, they have never developed ways of systematically using conviction-oriented information in routine evaluations of police performance. Because they continue to be arrest-oriented they have little motivation to do so now. Until they have become conviction oriented they will not feel a need for nor will they develop a method for incorporating conviction related data into measures of police performance and assessments of police policies. However, until they do incorporate such measures they will not become as useful to the prosecutor and the prosecution process as they should be. Somehow a break in this cycle must be made and apparently that break will require progressive police leadership. In a few places this is just beginning but it may take at least until the next generation of command-level police officers before this new definition of the police role wins any substantial acceptance.

committed dozens of similar errors. The best time for corrective feedback is as soon after the mistake as possible.

f. Training

Another form of communication for purposes of increased coordination is training. In several jurisdictions both police and prosecutors are involved in training each other. Prosecutors teach matters of law and give briefings at police roll-calls on specific issues such as new law or persistent errors in interpreting existing law. Police officers give seminars to prosecutors on investigative techniques particularly in specialized crimes. These training programs not only serve their manifest function of increased coordination on particular issues but they usually also serve the latent function of allowing for an open and lively review of recent actions and decisions taken by each agency.

Cooperative and coordination between police and prosecutors would be further enhanced by training programs which meet the following needs: (a) members of each agency need to develop the skills and knowledge appropriate to the core technology with which they work which means operating an information processing system and making appropriate decisions; (b) line and executive members of each agency need to develop and understanding of the constraints under which each agency performs its respective functins as well as the constraints under which the other agency operates. This requires developing a broad view of the overall administration of justice and the role of their respective agencies in it. (c) Members of each agency need some direct

experience with the work of the other agency.

The National Advisory Commission on Criminal Justice Standards and Goals (1973b:4.1.3) was correct in recommending that police training programs "should provide for the instruction of police personnel in the functions of all criminal justice agencies in order to place the police role in proper perspective [and] should encourage . . . the participation of other criminal justice agencies in police training." The Commission should have made parallel recommendations for prosecutors.

In order to achieve better coordination, cooperation and a more harmonious working relationship, police and prosecutors need to develop reasonable expectations of what the other agency can do for them. This is not to say they must accept whatever the local standard of performance is no matter how low. It means that while they must have high standards of performance they must also have a sense of what is reasonable in individual cases. This is necessary in order to minimize the animosity and frustration which so frequently accompanies unreasonable expectations and prevents the development of cooperative relationships. It is not just to avoid personal frustrations but all of the negative consequences for the organizations that such frustrations cause.

A few observations make the need for this kind of training apparent. One of the most common complaints by the police about prosecutors is that they want too much information in a case. On the other hand, prosecutors complain the police do not supply enough. In city after city one hears the story of the young,

"green" assistant prosecutor who asks the police officer to track down every last scintilla of evidence. This is not just in the serious case but all cases. A slightly different version of the story arises out of those instances where the prosecutor "couldn't understand" why certain questions were not asked or things done. No doubt in some of these cases the prosecutors were engaged in a form of in-service training trying to teach what information prosecutors need. (This is something that is not only legitimate but to be encouraged.) However in many instances the police believe that it was, at best, a case of unreasonable expectations on the part of the prosecutor; and at worst, an implicit suggestion of any one of a number of criticisms of the police including that they were incompetent, lazy, ignorant, or dishonest. These perceptions are not only galling but self-defeating. They lead to evasive tactics on the part of the police, demoralization, and defensiveness in communication with all that this implies. The attitude is easily developed among police that "since you can't please the prosecutor no matter what you do, then why bother? Just get the case accepted for prosecution and forget about it. Otherwise they'll have you running like a dog to fetch their slippers."

Some prosecutors have recognized the importance of knowing what it is like "out there on the streets" where the police have to try to obtain information under rapidly changing circumstances and intense emotional conditions. They believe that such knowledge not only helps avoid unnecessary antagonisms with the police but also helps make a better prosecutor. For example, the

prosecutor who has seen how household burglaries are handled may be in a better position at plea bargaining or at trial. He may, for instance, have seen the police apprehend a suspect a short distance from the home in possession of a lady's watch and have a very emotional man (apparently the owner of the house and the husband of the victim) come up and say it is definitely his wife's watch. A year later at trial a defense attorney using a standard defense tactic of trying to reduce the credibility of the state's case, raises the question of whether or not the watch was really stolen. How does the state intend to prove that the watch came from the burglarized home? The police officer testifies that the husband said it was his wife's watch. The defense attorney then proceeds to try to make the officer look grossly incompetent. He inquires whether the officer asked the man to explain how he knew it was his wife's watch. "Did you ask him, Officer, whether there were any engravings on it? Were there any special indentifying marks or serial numbers? Did you even bother to ask these questions?" The scrupulous officer will be forced to answer, "No", to these questions and look foolish. But a streetwise prosecutor can come to his aid. He can provide the officer with an opportunity to explain why one does not ask a hysterical person whose house has just been burglarized questions that may be regarded as "stupid" or "annoyingly apparent" to the victim.

It is not just the police who need to be understood by prosecutors. It would be equally beneficial if the police had an appreciation of the constraints under which prosecutors operate.

Just as there is a benefit in avoiding instances where prosecutors draw unwarranted inferences of incompetence, laziness, ignorance, or dishonesty about the police, there is also a benefit in avoiding similar inferences by the police about prosecutors. There is enough in the way in which prosecutors administer justice that makes it easy for the police to develop the impression that their decisions are the result of political motivation, incompetence or laziness (see e.g., Diehl and Weiser, 1980). Add to that, there are enough instances of real political corruption, incompetence, or laziness that the police have seen themselves that the conclusion that the whole system operates that way may not appear unreasonable to them.

Without a familiarity with what happens to cases in the prosecutor's office, without knowing the enormous logistical problems involved in bringing a case to successful resolution at trial, the police are invited to draw inaccurate inferences as to why the prosecutor takes the actions he does and why he does not always consult the police regarding case disposition decisions even in jurisdictions where there is an announced policy of doing so. When police and prosecutors misread the legitimate exercise of the discretion of the other agency and conclude that discretion is exercised for improper motives, then the fundamental ingredient that makes coordination and cooperation possible, namely, trust, is reduced. Without the trust neither side is as willing to work with the other. This point is the topic of our next chapter.

D. Summary

The degree of coordination and cooperation police and prosecutors varies widely among jurisdictions along a continuum from the minimum necessary to transact business (i.e., process cases) to the opposite extreme of partial "mergers" in which police and prosecutors join each other on special task forces. The main mechanisms of coordination and cooperation between police and prosecutors are: informal social structures; exchange relationships; and selected formal structures. Although formal chains of command exist within and between police organizations much of the coordination between these two agencies at both the line and command levels relies upon personal ties between individuals based on professional friendships and collegial relationships. When the need arises members of both agencies call upon members of the other agency whom they know and trust, or they do not call at all.

For this reason the usually high turnover rate among prosecutorial staffs as well as case transfer arrangements which isolate police officers from the prosecutors represent structural obstacles to developing better working relationships between the two agencies. The constant change in personnel depletes the network of social ties and contributes to the isolation of each group from the other. On the other hand, in encouraging collegial relationships between agencies, prosecutors must protect their staffs against cooptation and the loss of the degree of detachment needed to resist inevitable police pressures for maximum prosecution and minimal legal constraint.

Prosecutors must walk the middle path. Too much aloofness alienates the police and reduces willingness to cooperate. Too close a relationship destroys the prosecutor's need for impartiality.

A second way of understanding the nature of coordination and cooperation between police and prosecutors is in terms of exchange relationships, i.e., voluntary agreements involving the offer of any utility in exchange for some utility offered in return. This happens at both the individual and organizational levels between police and prosecutors. A common and most important exchange which sometimes goes awry is "taking the heat" for the other agency. There are numerous other exchanges that occur including: accepting weak cases "just to get along" with the police; salvaging cases that the police "screwed up" by getting at least something from them through plea bargaining; making good on promises police made to defendants; and keeping prosecutors informed about the progress of sensitive investigations.

As for formal coordination between police and prosecutors, this has been attempted through the use of various mechanisms. "Coordinating councils" with representatives of police, prosecutors and sometimes other agencies have been established. However, none of these represent the kind of system-coordinating, policy-making body advocated by reformers (e.g., Freed, 1969). Their main function seems to be promoting good will and trust among agencies rather than setting overall law enforcement and prosecution policies or resolving disputes between agencies.

However, in one large jurisdiction the police and prosecutors have established a command-level coordinating group that meets bimonthly and deals with specific problems and complaints that arise between the two agencies. This group does not set overall system policy, such as the level of resources to be devoted to certain kinds of crime. But it does resolve limited issues that would otherwise fester and alienate the two groups.

"Police-prosecutor liaison" programs are a second kind of formal mechanism used in a large number of jurisdictions. However, these programs differ considerably in their purpose and operation. One common type involves assigning either one police officer or a unit the responsibility of coordinating case transfer from the police to the prosecutor as well as return requests for additional investigation. This type of liaison program can be valuable as a coordinating mechanism not only in connection with the routine processing of cases but also in the unrecognized but highly useful role of trusted go-between whom both agencies use to check the motives and intentions of the other. On the other hand, some of these liaison programs have the effect of further isolating police and prosecutors from each other. These are the programs where the liaison replaces the individual officer bringing over his own case to the prosecutor's office. Under such circumstances patrol officers rarely interact with or learn the needs of prosecutors; and investigators have a considerably reduced level of interaction with prosecutors.

A third formal mechanism of cooperation is the appeal

procedures established in some jurisdictions by which police officers can appeal the decision of line-prosecutors to a supervisory prosecutor. These procedures serve primarily as gestures of good will and as safety valve measures for occasional cases.

A fourth mechanism is the formal intake screening units through which prosecutors review cases directly with the police and give them immediate feedback on the quality of their performance and the need for further investigation.

A fifth mechanism is the formal, written feedback of case outcomes and the reasons for decisions sent by prosecutors to the police. In theory such feedback systems are exactly what is needed to overcome the lack of coordination between police and prosecutors that arises from the fact that police are not oriented towards measuring their performance in terms of what happens after the case is accepted for prosecution. Their circumscribed horizon is due to a large degree to the fact that they do not systematically learn what the outcome of a case was or the extent to which their handling of it was responsible for a disposition that was more lenient than it might have been. The police want feedback for three reasons: (1) to improve their own efforts; (2) to have the satisfaction of knowing the results of their efforts; (3) and to fulfill one of the less visible obligations of their job, namely accounting to victims and the public for the case. The majority of police departments surveyed in our national probability sample say they do get some feedback from prosecutors on dispositions and the reasons for them at

initial charging (68%) and for dismissals and plea bargains as well (86%). But, this finding is deceptive. It does not mean that the police are getting the kind of feedback they need.

In part the latter is due to the police themselves. Our field visits found that one of the main breakdowns in the feedback systems that do exist occurs when the information reaches the police departments. There the information is usually not distributed to the relevant individual officers and, more importantly, is not used systematically in assessments of police performance. The latter is, of course, tied to the traditional definition of the police role as ending with arrest. Until police performance is measured to some extent in terms of the ability to make a case trialworthy and until methods are developed to help police managers interpret prosecutors' feedback for its meaning regarding police performance, feedback systems will not serve the coordinating function that they could and should serve.

A sixth major mechanism of coordination between police and prosecutors is the mutual participation of each in the other's training programs. This is already occurring in some jurisdictions but its full value is not being systematically or regularly exploited and the nature of the training does not always address the relevant needs. For both prosecutors and police those needs include not only developing necessary skills and knowledge regarding investigating and prosecuting cases but also developing a broad overview of the criminal justice system with an understanding of the constraints under which each of the

two agencies operate. This should be done not only through classroom instruction but through direct observation of each other at work in the field. Prosecutors need an understanding of "the street" and police need an understanding of the negotiation and trial processes.

CHAPTER 6, TRUST AND EFFECTIVE POLICE-PROSECUTOR RELATIONS

A. A Necessary Condition for Cooperation

The general level of coordination and cooperation between police and prosecutors is highest when a climate of trust has been established between them. Furthermore, with that trust comes the possibility of developing even better cooperation through new programs and arrangements. If trust is not established and continuously nurtured, calls for better coordination will go unmet. The difficulties of communicating across organizational boundaries or between different disciplines pale before the difficulties of communicating between people who do not trust each other.

Strategies exist for improving and maintaining the climate of trust between police and prosecutors. It is easiest to establish such a climate coincident with the change in administration either in the major police department or in the prosecutor's office. However, even in jurisdictions with incumbent administrations that have been sitting for long periods of time, it is possible to establish where it it has not existed in the past. This climate of trust between police and prosecutors is not necessarily destroyed by the prosecutor's exercise of his duty to prosecute police officers for unlawful actions provided that the prosecution is not seen by the police as politically motivated.

Trust between police and prosecutor organizations is increased when each agency develops the opinion that the other is

genuinely interested above all else in the fair, efficient and effective administration of justice. This can occur in a number of different ways including: when prosecutors (a) show some responsiveness to police priorities; (b) independence from political influences; (c) willingness to work with and be available to the police; (d) consistency in decision making; (e) tactfulness in interpersonal exchanges with police officers; (f) when informal social ties between police and prosecutors are allowed to develop (i.e., when personnel turnover rates are not excessively high; when there are parallel organizational units, e.g., robbery squads, in both police and prosecutor offices or when police and prosecutors work together on strike forces); (g) certain kinds of police-prosecutor liaison officers exist; (h) the prosecutor's office is staffed primarily with full-time rather than part-time employees; (i) local police have not developed a reputation for perjury; (j) the local police investigative efforts are "good" (aimed at making trailworthy cases; do not rely primarily on confessions; make efforts to obtain fingerprints and other physical evidence; and reports are well written); (k) formal channels of communication between police departments and the prosecutor's officer are extensive and frequently used; and (l) when both sides are careful to limit their criticisms of each other to fair and legitimate criticisms as opposed to "cheap shots."

This chapter begins by setting the discussion once again in the larger context of organizational research, especially the results of research on the impact of distrust on communication.

It then documents the ways in which distrust between police and prosecutors adversely affects the administration of justice and prevents better cooperation between these two organizations. Finally, it reviews the means which have been used (both deliberately and unwittingly) by both organizations to establish trust between them.

B. Literature Review

All cooperative efforts done on a voluntary basis require trust. Trust involves the belief that the other party in the effort will not injure the first and that the other party will do his part. Ironically even illicit enterprises such as bookmaking require such trust (Cohen, 1966). Even within organizations where members are paid wages for their labor, the money incentive does not fully account for their activities and performance. Distrust results in behavior disruptive to achieving organizational goals. Two ways in which this happens are that it reduces the willingness to cooperate, to do one's part, and it causes people to engage in defensive communication.

Cooperation and communication are so critical to the effective operation of large-scale bureaucracies that Barnard makes them central to his classic definition of the essence of what an organization is. "The elements of an organization are . . . (1) communication; (2) willingness to serve; and (3) common purpose . . . . The vitality of organizations lies in the willingness of individuals to contribute forces to the cooperative system" (1970:65). In Barnard's terms, actions by

either police or prosecutors which reduce the other's willingness to serve sap the vitality of the system of justice.

With regard to communication, the research of Gibbs (1976) is especially relevant to the police-prosecutor relationship. He found that when an individual perceives or anticipates threat he becomes defensive and this reduces his usefulness in the communication process. He begins to devote much less attention to the common task and more energy to defending himself. Rather than concentrating on accurate full and complete communication he becomes more concerned with how he appears to others; how he might make himself be seen favorably; how he might "win, dominate, impress or escape punishment; and/or how he [might] avoid or mitigate a perceived or an anticipated attack" (Gibbs, 1976:479).

C. Distrust and the Police-Prosecutor Relationship

1. The Context of Distrust

The police-prosecutor relationship contains numerous potentials for distrust. Even when relations are harmonious there is always a background of potential mistrust. This is implied, for example, in the comments of the chief of police who told us that the local D.A. was doing such a fine job he (the chief) did not "even have to keep a record on him." This general climate of suspicion surrounds the police-prosecutor relationship both at the organization and individual levels. Each group is suspicious of the other's motives, competence, veracity, integrity, values, and reliability. There are numerous

opportunities and temptations to attack the other agency for real or imagined faults; for political gain; or unintentionally, as the result of controversaries manufactured by the news media. In the law enforcement/prosecution processes there are many opportunities for things to go wrong and many reasons for blaming others for one's own frustrations. Even when no errors have been made the public is often still unhappy with the justice system. That system is afterall an institution which society has created to solve unsolvable problems and to do so efficiently (Wilson, 1976). Even perfect justice can never rewrite history. A wrong has been done and righting it is never as satisfying as if the wrong had never been done. To the extent that justice is less than perfect, public satisfaction is proportionately lower.

Police and prosecutors are in effect operating a no-win institution; yet, they are expected to win. This forces them into a continual public relations effort to convince the community they are in fact winning. This creates a context in which they are potential adversaries in competition for public approval and support. One tactic is to get approval for one's organization at the expense of the other. This is frequently done through press releases to the effect that "We're doing a great job but the system is failing because the other guys are not doing their job."

The other major strategy for convincing the public that one's organization is succeeding is through the use of statistics that allegedly measure of one's success. The police use arrest and clearance rates; prosecutors use conviction rates. In doing

so they are both potentially pitted against each other. Both can manipulate their respective statistics to look good but in the process they make the other agency look bad. The police can look good by making lots of arrests and by "overcharging" cases, i.e., filing them as felonies when the "really" are misdemeanors. Prosecutors can protect their conviction rates by accepting only "strong" cases; by using the number of cases formally charged (as opposed to all cases referred by the police) as the denominator for their conviction rates; and by "giving away city hall" in plea bargaining in order to get a conviction rather than lose or dismiss a case.

To the extent that either of these agencies engages in such statistical maneuvers they make the other agency look bad. They create a large number of cases which appear to drop out of the system either as the result of bad police work or "bargain justice" from prosecutors. The struggle that goes on between police and prosecutors in case review is seen by both sides partially in terms of this battle over statistics and their public relations value. One hears police saying that "the prosecutor is only trying to protect his record" and prosecutors saying that "the cop is just trying to squeeze a felony out of a simple misdemeanor."

In addition to the competition for public approval, another source of distrust in the police-prosecutor relationship lies in the nature and context of each other's work. Prosecutors continually hear allegations of unlawful police behavior from defendants, defense counsel and even other police officers. In

reviewing cases they come to recognize suspicious police reports. They learn about the existence of police perjury. They see the mistakes that police make. They know of officers who are lazy, willing to lie on the witness stand, and willing to provoke suspects into fights. Out of all these experiences they become skeptical about police integrity.

On the other hand, the police watch plea deals being made in courthouse corridors between prosecutors and defense attorneys who lunch together and may even have been partners in the same law firm (see, e.g., Diehl and Weiser, 1980). They "know" that certain defense attorneys who belong to the country club or the right political party get better deals than others. They have been told to put the breathalizer and the speed detection equipment into the shop for repair during the several weeks preceding the prosecutor's election. They know prosecutors who are lazy and are willing to bargain everything away before doing the hard work of taking a case to trial. They have seen that standards vary, that decisions depend on which prosecutor you talk to, and that if a prosecutor "really wanted to" he could take a weak case and get something out of it in plea bargaining. They believe that these young prosecutors are not really committed to a career in law enforcement and are just using the office to get experience and "inside" contacts shortly to be used for their own economic well-being when they become practicing defense attorneys. For all of these reasons the police become as skeptical about prosecutors as prosecutors are about them.

2. <u>The Impact of Distrust</u>

The impact of the lack of trust in the police-prosecutor relationship is hard to measure quantitatively. How does one gauge the effect on crime or conviction rates of the cooperative programs that were never established because neither organization trusted the other enough to join the venture? How does one measure the effect on case outcome of information not transmitted by the police because they did not trust the prosecutor? About the only available indicators of these costs are anecdotal reports of incidents where trust was the key factor affecting the administration of justice. A selection of such incidents presented below illustrates how various aspects of the administration of justice were affected by the lack of trust. In one case the successful adaptation of the local jurisdiction to the new speedy trial rule was at stake.

<u>Illustration #6.1</u>

In several jurisdictions legislatures have passed speedy trial rules requiring that cases go to trial within a certain number of days <u>from arrest</u>. These laws have substantial significance for the cooperative relationship between police and prosecutors because the police decision as to when to arrest affects the time available to the prosecutor to prepare for trial. In several jurisdictions prosecutors have responded by trying to get the police to change the timing of their arrests. Instead of arresting as soon as they had sufficient evidence to meet the minimal standard of probable cause, they have tried to get the police to wait until they have prepared their cases as fully as possible (unless, of course, there is a risk of flight or the destruction of evidence).

In jurisdiction 3 the prosecutor made this kind of request of the police department. However, the police high command were not sure how to react. Although they had a reasonably good relationship with the prosecutor and knew he had an unquestioned reputation of being tough on crime, they seriously considered the possibility that he was trying to "put it to them." They

anticipated that this policy would make them "take the heat" for delaying arrests in cases where they had enough evidence to arrest; and they realized they would be running the risk of someone escaping while the police were still building the case. In effect, the policy the prosecutor was requesting contained risks for the police but none for the prosecutor. It would be the police fault if a known suspect got away or destroyed evidence because of this policy.

On the other hand, if the police continued with their existing policy of arresting as soon as they could all of the risk created by the new law was with the prosecutor. He would take the heat if a case was subsequently dismissed because of his failure to prepare for trial.

The police eventually adopted the policy requested by the prosecutor but not until they were certain of the honor of his intentions. They called in their liaison officer who spends half of his day in the prosecutor's office and were assured by him that the prosecutor had a legitimate concern here and was not simply trying to "put the screws to them."

A second incident reported to us by a chief prosecutor from a small jurisdiction illustrates the problem of defensive communication.

Illustration #6.2

The chief prosecutor stated: "You need trust between police and prosecutors. Otherwise there's no free flow of information. They (the police) were afraid to tell us things [after a hit-and-run incident resulting in substantial adverse publicity for the police]."

The incident involved a president of a local college who knocked a woman off her bike and left the scene. Witnesses said that they thought the driver of the hit-and-run was the college president. The university police heard the president's license plate number being called over the police radio and warned the president. When the city police arrived at the president's house they simply asked him if he had done it and he denied that he had. The matter ended there until several months later. The victim began making additional inquiries into the matter and a grand jury was called to inquire into the possibility of a cover-up by the local police.

The whole matter produced considerable negative publicity for everyone involved. Out of town newspapers and the student press covered the story including the trial during which one of the police officers involved broke down in tears under cross-examination.

The police blamed the prosecutor for much of the negative publicity because of the strong nature of the grand jury report that was issued under his influence. But, according to the prosecutor he had tried to get the grand jury to tone down the report. In any event, after that incident communication between the local police and the prosecutor's office was not the same. As Gibbs' (1976) research would lead one to expect, it became defensive. The prosecutor explained, "Normally an investigation for a hit-and-run would be a one-page report. However, after the grand jury report we started getting 40-page reports for hit-and-runs. In addition, in minor crimes if there were any questions as to whether or not there were grounds for arrest, the cops would take down the information but tell the people involved 'you have to see the prosecutor.' We were deluged with bar room fights; the police would have three witnesses for and three witnesses against who threw the first punch. From the reports you could barely figure out who was really wrong. But after the police gave us the case they would then go to the press and make it appear that one of the two parties was in the right."

In addition, police released statistics on how the prosecutor disposed of bar room fights. They made it appear as if the prosecutor was not adequately prosecuting the cases.

A third incident illustrates how distrust results in the ultimate form of non-cooperative behavior, namely, avoidance.

Illustration #6.3

The director of a statewide institute for police management reported to us that he receives calls from police departments from all across the state asking for advice on various legal and tactical aspects of cases they are handling. He usually asks why they do not speak to their local prosecutors about it. The answer is invariably that they feel he would either not want to be bothered or they do not trust him enough to ask.

Avoidance behavior between police and prosecutors goes both ways

and is fairly common. In his survey of police and prosecutors in Illinois cities, Clark (1966) asked members of both groups if they had deliberately failed to interact with each other on official matters because the personnel of the other agency was not what they should be. As indicated in Table 6.1, there is a substantial amount of avoidance by members of both organizations although the rate is two to three times higher for prosecutors than for the police.

Table 6.1

PERCENTAGE OF AVOIDANCE OF INTERACTION BETWEEN POLICE AND PROSECUTORS BY TYPE OF AVOIDANCE*

Avoided or ignored the situation		Turned to somebody else		Took care of things personally	
Prosecutor avoidance of police	Police avoidance of prosecutor	Prosecutor avoidance of police	Police avoidance of prosecutor	Prosecutor avoidance of police	Police avoidance of prosecutor
63%	27%	50%	30%	87%	31%

* Percentages are those who failed to interact "sometimes," "often," or "almost always."

D. Strategies for Obtaining Trust in the Police-Prosecutor Relationship

To recommend that police and prosecutor organizations should suddenly start communicating with each other and be cooperative when they have not been in the past is naive.[30] What must also be

30 If one were to make such recommendations at annual meetings of police or prosecutor executives, he will be greeted with howls of laughter--as we can attest.

offered is a set of strategies to achieve the trust needed before better communication and cooperation can begin. Such strategies exist. Moreover, they appear to be feasible even in jursidictions with incumbent administrations. However, it is usually easier to implement changes in the nature of the police-prosecutor relationship when a new administration takes office (in either organization).

In general, the strategy for winning the trust of the other agency is the same for both police and prosecutors. It involves making good-faith efforts to show the other agency that the first organization is are genuinely interested above all else in the fair, efficient and effective administration of justice. This can be done in numerous ways as described earlier. It may mean listening to criticism from the other agency about one's own policies and personnel; being willing to acknowledge one's faults and explain one's policies and decisions; resisting the temptation to publicly criticize unfairly the other agency solely to score some quick political gain; demonstrating a willingness to work hard to to be tough at appropriate times; or demonstrating a willingness to be helpful to the other agency and take its priorities and concerns into account as much as possible (without necessarily compromising oneself in the process). There are time and action dimensions to these suggestions. Trust takes a long time to establish and is quickly lost. Actions speak louder than official policies, joint communiques and other forms of official rhetoric.

This may all sound painfully simple, apparent, and somewhat

pollyanna-ish, but a quick check with one's local police and prosecutors will show that it is not. Despite the calls for better cooperation between these agencies there is little conscious awareness of how to bring this about. Even in jurisdictions where one agency has won the trust of the other the parties involved are not always consciously aware of the extent of the success, the reasons for it, or the impact of it on their relationship with the other agency.

Our own ideas about how trust is established and maintained were were arrived at by looking for the common denominator in a series of different incidents and reports. They are presented below as examples of individual tactics for achieving trust. It should be noted that no individual tactic constitutes a formula for success. Rather it is the symbolic significance of the tactic that is the key. The tactic is merely an indication of the underlying commitment to the fair, effective and impartial administration of justice that must be demonstrated for trust to be established and maintained. In any particular jurisdiction one agency determined to win the trust of the other may have to employ several tactics to convincingly show its commitment to these goals. Even this may not be successful because there are no guaranteed formulas. However, for those executives interested in trying, the review below of the experience of others may prove helpful.

One former chief of police had given this topic much thought and had developed a deliberate strategy for winning the trust of incoming chief prosecutors. He would visit the new prosecutor as

soon after the election as convenient and declare his intention to cooperate with the prosecutor's office as much as possible. He also craftily asked the prosecutor to keep an eye out on the performance of his police officers and let him know what mistakes they made and what room there was for improvement. The chief reports that the prosecutors were usually stuned by this approach. They were amazed that a police chief would seek out, much less accept, criticism from a prosecutor. He found this tactic usually got the relationship off to a good start.

Other noteworthy tactics listed below are drawn from the experience of a newly elected prosecutor in jurisdiction 16. This prosecutor was intent on improving police-prosecutor relations and deliberately did some things to "establish credibility with the police." In interviews with the police we found that those explicit gestures of good will were received favorably, and cooperative relations with the prosecutor's office were eventually established. But, the police were also impressed with other things the new prosecutor had done which (we know) were not done for the purpose of improving the police-prosecutor relationship. In fact, the prosecutor was not even aware of the powerful and beneficial impact these actions had had on the police opinion of the prosecutor's office. These various actions are presented separately in the list of tactics below.

One gesture of good will by prosecutors towards police is to make themselves available to the police on a 24-hour, 7-day-a-week basis.

<u>Illustration #6.5</u>

This was one of the deliberate gestures of good will made by the new chief prosecutor in jurisdiction 16. The prosecutor went to the police and announced that henceforth there would be a prosecutor available at all times to answer questions and give legal advice to the police. This opening gesture was initially met with cynicism. The police figured this would last about a month and then be forgotten.

But it was not forgotten and the police now call the prosecutor regularly and they do trust the advice they get, as indicated by the comment we overheard on policeman in jurisdiction 16 make to the first assistant prosecutor. He was saying, "If you say there is not enough to proceed, then I know that there really is not enough to proceed."

A second tactic is being willing to accept criticism from the other agency as well as to give criticism but to do so only in specific terms and not through the press.

Illustration #6.6

This tactic was consciously used by the chief of police mentioned earlier and unwittingly used by the chief prosecutor in jurisdiction 16. In the latter case it came about because early on the prosecutor started hearing generalized police complaints about his office, like, "Well, prosecutors in your office do this and that." Somewhat defensively the prosecutor always told the officers making such comments to "put up or shut up." A policy was formulated. There would be no generalized "bitching" by one agency against the other. The prosecutor stated he would be willing to hear complaints from the police only if they were specific; that he would make complaints about the police only in specific terms; and that he would not play "the newspaper game" with the police. All complaints would be addressed directly to the police.

Another tactic is for the prosecutor to demonstrate a certain degree of "toughness" or "seriousness" about getting convictions both in general and for specific classes of cases, such as juvenile cases. This can be done either by being more willing to take cases to trial or being more determined that cases reach an appropriate disposition.

Illustration #6.7

One of the things that impressed the police about the new administration in the prosecutor's office in jurisdiction 16 was that they would try cases that "nobody would try before." For example, under the previous administration there were very few trials in homicide cases. "Everything would be pled out." In contrast under the new administration homicides frequently went to trial even ones in which there was only circumstantial evidence and hence were tempting to plea bargain rather than risk a loss at trial.

Illustration #6.8

In jurisdictions 15 and 16 the handling of juvenile cases was a source of mistrust in the police-prosecutor relationship. The problem, the solution and the impact on the police-prosecutor relationship was virtually the same in both places. The prosecutors' offices discovered that police work in these cases was exceptionally shoddy. The information in police reports was next to nothing. "The paperwork on these cases became a joke. The cases became known as 'candy wrappers' because the reports were written on anything, scratch paper, anything you could get! The reports were absolutely minimal such as 'This kid was in the county and committed a crime'" (chief of prosecutor's juvenile division, jurisdiction 15).

The problem was that too many cases were being disposed without serious attention from the criminal justice system. In jurisdiction 15 in 1975 there were 12,000 juvenile arrests but only 2,000 cases filed for prosecution and only 19 juveniles held to stand trial as adults. The high release rate was due in both jurisdictions to the local health and rehabilitation agency which reviews juvenile cases and recommends dispositions. Because "the cops knew the kids would be cut loose faster than the cop could write his report, they felt 'why bother?'" (Id.)

When the prosecutors' offices learned of this situation they had to change the police attitude. "First, we had to convince the top command that, yes, if you have a good case we'll do something about it. We won't let the Division of Health and Rehabilitation drop the case out of the system" (Id.). This verbal commitment was backed up by actions. In jurisdiction 16 the prosecutor began reviewing all juvenile cases before they were referred to the juvenile services agency. In jurisdiction 15 the prosecutor more than doubled the number of juvenile cases (4,600) he accepted for prosecution and had more than seven

times as many juveniles tried as adults (from 20 to 146).

The dramatic changes in the prosecutors' attitudes and actions were quickly reflected in equivalent changes in the police attitudes and actions. "As a result we get much better reports from the cops. In fact, the juvenile reports are every bit as good as the adult crime reports" (Id.). Candy wrapper justice had ended.

Another way of winning trust is to demonstrate one's independence from political ties, political considerations, or considerations or personal gain. If any agency demonstrates a clear impartiality in its decisions, then the legitimacy of its actions is accepted even if they have adverse affects on the other agency, such as prosecuting police officers.

Illustration #6.9

The thing that apparently impressed the police the most about the new prosecutor's administration in jurisdiction 16 was that within the first six months of taking office it went after the local "club" that used to control the prosecutor's office. This club included several judges, prominent lawyers and politicians. It did not include the police.

Under previous administrations the prosecutor's office had been dominated by the local bench and was used by the club to assist its relatives to get started in legal practice. Many of the prosecutors' staff were sons, daughters, other relatives or friends of the local club. These people were frequently employed in the part-time positions in the prosecutor's office. This allowed them to get some experience practicing law and assured them of a steady income while they got their own private practice started. They would prosecute cases part of the day and work in their private firms as soon as they could dispose of that day's calendar of cases. This was not illegal but it was in the view of the police unseemly. When the new prosecutor refused to accept this long-standing tradition the prosecutor's office went up in the eyes of the police. But that is only part of the story.

Next the prosecutor indicted a prominent local defense attorney and prosecuted the case eventually losing it. This had a powerful effect on establishing

credibility with police because it indicated the prosecutor's office was now going to be independent of old political ties and would not be dominated by the local bench. In fact, in the course of the prosecution three sitting judges were called as witnesses. They were not co-defendants but the mere calling them as witnesses revealed that they had something to do with the alleged criminal act on the part of the lawyer. Most important of all it demonstrated to the police the extent to which the prosecutor was willing to take on the establishment. It cleared away the cloud of favoritism and corruption that had surrounded the prosecutor's office in the past.

These actions together with the other efforts to win the trust of the police succeeded in establishing the prosecutor's credibility as someone genuinely interested in the impartial administration of justice. Once that was established the prosecutor could and did begin focusing on improper police behavior. The office has since prosecuted several policemen for various crimes committed on and off duty including one of the most sensitive areas in police work, namely, excessive force. The prosecutor believes that their rate of prosecution of these kinds of cases is higher than that of jurisdictions of similar size yet it has not caused any adverse repercussions with the police. The prosecutor is convinced that this is so because of the well-established reputation of impartiality of her office.

The prosecutor noted two other important consequences of having established credibility with the police (something which took a matter of several years to do). Previously the police would withhold information from their reports because they were afraid the prosecutor would turn it over to the defense attorney. For instance, they might even hide the fact that there was a confession in the case for fear that the prosecutor would turn it over. Now this kind of withholding of information does not occur.

The second impact on communication has to do with the willingness of each organization to exchange candid criticisms of the other. This is possible because the trusting relationship has allowed for informal organization to flourish and some things can only be done through this informal network. For instance, with regard to criticizing each other's work both sides would prefer not to do it in a formal way. The first assistant prosecutor noted that when criticisms do occur they only occur through the informal network. For instance he heard from the police that they had nicknamed one of his assistants, "Monty Hall" from the

television show, "Let's Make a Deal." This is because, according to the police, the assistant was plea bargaining all of their cases. That assistant was eventually fired.

Yet another tactic for prosecutors to use is to acknowledge the value of police judgment. This can be done in several ways such as allowing for police input into the prosecutor's screening standards.

Illustration #6.10

This was done with notable success in jurisdiction 2. The prosecutor went to the police and asked him to make lists of criminals who were most active in their respective jurisdictions. This was to be based not only on prior record information but also police intelligence.

The list was to be used by the prosecutor's office in its screening and plea bargaining decisions. If a defendant were on the list the prosecutors were to hold out for a more severe disposition. The prosecutor made this move in connection with a planned career criminal program. He had not anticipated how pleased the police would be with his office for seeking their input in this way.

While several of the examples above describe what prosecutors can do to win the police trust, the tactics involved are equally applicable to police efforts to establish credibility with prosecutors. Patterns of arrest which suggest to the prosecutor a lack of impartiality by the police will reduce the department's credibility with prosecutors. Patterns of investigation, especially an overreliance on confessions at the expense of gathering other testimonial and physical evidence, will also reduce police credibility as well as the prosecutor's willingness to cooperate. Police administrators intent on establishing their department's credibility with the local prosecutor's office might

take actions to correct these practices, possibly in collaboration with the prosecutor's office.

One final tactic equally applicable to both sides is to show a willingness for hard work. For the prosecutor this can be done by such things as being willing to work outside the "banker's hours" which police perceive them to keep. Especially effective is being willing to respond to arrest and crime scenes. The police in jurisdiction 1 were very impressed with this aspect of the new prosecutor's on-call policy. For the police, willingness to work hard as far as the prosecutor is concerned means willingness to prepare good cases and do follow-up investigations.

D. Summary

Greater coordination and cooperation between police and prosecutors is a desirable goal which reform groups have sought to achieve for years and for which various mechanisms already exist. The main obstacle to achieving greater coordination and cooperation is the lack of trust between these two agencies. The general level of cooperation between them is highest when a climate of trust has been established. The single most important factor in developing and maintaining trust between the two agencies is for one agency to demonstrate to the other that it is genuinely interested above all else in the fair, efficient, effective and non-political administration of justice. This can be achieved through a variety of specific tactics but the tactics themselves are not the formula for success. Rather it is their underlying significance as indicators of this commitment to the

impartial administration of justice.

Some tactics include: for prosecutors, showing some responsiveness to police priorities; independence from political influence; willingness to work with and be available to the police; consistency in decision making; tactfulness in interpersonal exchanges; and for the police the avoidance of a reputation for perjury; conducting thorough investigations; and for both agencies restraint in criticizing the other and a willingness for hard work.

Once a climate of trust has been established it will not necessarily be destroyed by situations where prosecutors must prosecute police officers for some unlawful actions provided that the prosecution is not seen by the police as politically motivated.

In some jurisdictions the alienation between police and prosecutor agencies may be so great that achieving greater coordination and cooperation under the current administrations may not be feasible. But in most jurisdictions it is possible to reverse previous patterns of isolation and distrust by determined efforts to win the other agency's trust.

PART III
POLICE, PROSECUTORS AND THE CRIMINAL JUSTICE PROCESS

CHAPTER 7, CRIMINAL JUSTICE: STAGES, PROCESSES AND ISSUES

A. Introduction

This chapter focuses on the criminal justice process, the central issues facing it, and the role of police and prosecutors in responding to those issues. It analyzes the police-prosecutor relationship in two overlapping ways: once in terms of discrete stages of the process and also in terms of the two sub-processes of the overall, generic process of case screening, namely, the charging process and the plea (or, more generally, the dispositional) negotiation process.

The analysis reveals the variations by jurisdiction of the interface between police and prosecutors and the significance for the quality of justice of these variations. The discussion builds on our earlier description of the division of labor between police and prosecutors but examines the matter within these analytic divisions. The descriptions of the arrangements in any jurisdiction should be regarded as snapshots of arrangements that are continually evolving. As noted previously the overall shift is for the prosecutor to extend his domain into the earlier stages of the overall process and to begin to emerge as an overall system planner and coordinator.

The analysis will show: (a) that the main problem for the contemporary administration of justice is to find ways to fairly, effectively, lawfully, efficiently, and accountably bring as many cases as quickly as possible to dispositions other than adjudication at trial; (b) that the two critical agencies in this

process are the police and the prosecutors; and (c) that for various reasons, the response of these agencies to this basic challenge has been at best tentative, fraught with misunderstandings and tensions, hampered by outmoded legal structures, and by the lack of a truly systemwide view of the problem. Nevertheless, some progress is being made. The trend for the future is discernible. Then, as now, most justice will be administered by police and prosecutors at the early stages of the process. But, hopefully, by then this justice will be more rationalized, even-handed, controlled by appropriate policies, subject to review, and in accordance with the rule of law.

B. The Nature of the Problem

In examining the functions of the police and prosecutors in the criminal justice process, it is helpful to expand upon Professor Kamisar's (1980:27) metaphor. The police and (most of the work of) the prosecutor are related to the trial court as gatehouse to mansion of justice. Not only has the American courthouse been the local community's architectural monument; but the felony trial stage of the criminal justice process has been the central focus of legal concern and the inheritor of the wealth of legal safeguards that is the legacy of Anglo American law. However, this disproportionate concern for the trial process stands in sharp contrast to the practical realities of the administration of justice. Most justice (in terms of numbers of cases disposed) is not administered in the mansions. It occurs as earlier points in the justice process, at the arrest,

charging, diverting, and plea bargaining decisions; and it is administered by police and prosecutors. Moreover, it is in the gatehouses of justice that the main problem facing the American administration of justice must be solved. The number of criminal cases far exceeds the available criminal justice resources needed to dispose of them at trial.

This problem has come about as a result of the convergence of five factors: (a) increases in the number of crimes in society; (b) over-criminalization; (c) increased reliance on formal as opposed to informal mechanisms of dispute settlement; (d) increased pressures on the police to generate arrests; and (e) limited public budgets for crime responses. The increase in the absolute number of crimes has come about primarily as a result of population increases. The problem of over-criminalization has two aspects (Kadish, 1967). The first is the proliferation of criminal laws covering aspects of social behavior not previously prohibited. The second has to do with the use of criminal law for the enforcement of morality as such, including gambling, sex offenses between consenting adults, and offenses involving drunkenness and drug abuse. The increased reliance on formal mechanisms of dispute settlement refers to the trend toward invoking the criminal law to settle disputes that in an earlier and simpler societies would have been settled by informal means.[31] The pressure on the police to generate arrests

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31 This trend is one of the concomitants of increased industrialization, urbanization and secularization of modern society (Aubert, 1969). Although some people in contemporary society
(Footnote continued)

has been the result of the historical growth of police departments and the concomitant rise in public pressure for them to justify their expenditures with evidence they are winning the war on crime.

The key to solving the problem created by these converging forces is to build better gatehouses. The jury trial with its full due process guarantees must be preserved for the few cases which "need" to be resolved by jury trial and the vast majority of cases must be kept out of the mansion of justice. This can be done in two ways: decriminalization and selective enforcement (in the generic sense of selecting cases to be rejected, diverted to alternative dispute resolution mechanisms other than formal trial, and arriving at convictions through plea negotiations).

31(continued)
try to resolve their disputes themselves even ones involving crimes such as burglary (Smith and Maness, 1976), the trend has been to increasingly rely upon "calling the cops." More and more disputes even ones between relatives, friends, neighbors and, in general, people who are acquainted with each other are being referred to the criminal justice system for resolution. A substantial proportion of services, felony-level cases in the court systems involve disputes between people who know each other. In its study of the New York City Courts the Vera Institute of Justice (1977) found that 56% of the violent crimes and 35% of the property crimes involved victims and defendants who knew each other. These cases were usually disputes which errupted into the public expression of anger and, hence, the technical commission of a felony. These cases are consistently dropped out of the system earlier and with more lenient dispositions than "real" felonies. But in the process they drain limited court resources and weaken the court's ability to deal quickly and decisively with truely dangerous, predatory criminals. Vera (1977:XV) concluded that because "our society has not found adequate alternatives to arrest and adjudication for coping with inter-personal anger publicly expressed, we pay a higher price."

Of the two methods, decriminalization is less politically feasible. It has been recommended as the means of reducing caseloads since Becarria published his famous Essay on Crimes and Punishments in 1764. In more recent history there have been a few notable examples of decriminalization including the rescinding of alcohol prohibition, the current effort to decriminalize marihuana possession and the decriminalization of abortion and public drunkenness. However, notwithstanding these notable successes and the continued call for further decriminalization (Morris and Hawkins, 1970), decriminalization cannot be thought of as a major instrument of coping with the caseload problem, at least not in the short term. Selective enforcement has been and will continue to be the means by which justice is administered in America.[32] Thus, to understand the quality of justice one must examine the operation of the overall selective enforcement process. This means examining the work of police and prosecutors and the variations in the social organization in the pretrial stages of the criminal justice process. The analysis begins below with an examination of the components of the overall screening process and their relative merits.

C. The Solution: Selective Enforcement

Since the 1920's when the early crime commissions first

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32 Even in jurisdictions where caseloads are not yet so out of control that selective enforcement is a necessity, it exists nonetheless (Heumann, 1975).

documented the extensive attrition of cases from the criminal justice system there has been a slow, partial, and begrudging recognition among criminal justice officials that selective enforcement is a central reality of the American administration of justice. Given our legal system's commitment to the rule of the law and the promise of a jury trial to every defendant who wants one, selective enforcement has raised several critical issues. How is the selective enforcement to be done? By whom? At what point in the process? According to what criteria? And with what amount of due process and public accountability?

These questions have not been answered systematically. Rather, a patchwork of solutions general consensus is that the prosecutor should do the bulk of the screening; that much of it should be done through his charging function; and that this should be done early in the justice process; and should be regulated by policies and recorded in a way that allows for public scrutiny (President's Commission on Law Enforcement and Administration of Justice, 1967c).

In addition to the prosecutor's charging decision, there are other methods for achieving selective enforcement of law including: non-arrest, release after arrest by the police, plea bargaining and dismissal after formal charging (nolle prosequi). Neither the overall screening process nor the charging process in particular can be fully understood apart from these other mechanisms of selective enforcement in a jurisdiction. In some jurisdictions these alternative methods may either have to substitute temporarily or permanently for or supplement to the

nationality approved mechanism of selection. The relative merits of all five mechanisms of selective enforcement are presented below.

1. Selective Arrest

One obvious way of reducing system caseload is to not make arrests in the first place. We found no evidence in the field that police administrators were considering this strategy as a serious method for reducing the caseload problem. If anything, the major thrust of the police thinking is in the direction of making more rather than fewer arrests.[33] Typically, arrest quotas in police work are designed to increase arrests not limit them. This lack of attention to the question of how many arrests the police should be making is reflected in the criminal justice literature. For instance, the President's Commission on Law Enforcement and Administration of Justice (1967:104) recommends that police departments develop policy guidelines regarding "the decision whether or not to arrest in specific situations involving specific crimes." But, this recommendation was made with an eye toward relieving individual police officers from the "inappropriate and unnecessary . . . burden of exercising . . . discretion . . . in tumultuous situations" (Id.:106). It was not a call for the police to begin systematically limiting the number of arrests.

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33 Former New York City Police Commissioner, Patrick Murphy, served as a member of our Advisory Board and noted that in his experience the police have never seriously addressed the question of how many arrests they should make.

The desirability and feasibility of having the police develop such policies of non-arrest is substantial. An examination of the types of crimes police spend most of their arrest time on reveals the possibilities. Of the ten offenses for which arrests were most frequently made in 1965 (Table 7.1), five were the result of proactive policing (drunkenness, disorderly conduct, driving under the influence, liquor law violations, vagrancy, and gambling). Of the rest, only one (burglary) is the type of crime that one might not even consider reducing one's arrest resources against.[34] The significance of reducing arrests in the balance of the crimes (excluding burglary is that the nine of them taken together constituted approximately 70% of all arrests (excluding traffic offenses) that year.

With two notable exceptions there have been few calls for the police to systematically review and control the size and type of their arrest intake volume. One exception is Nimmer's (1971) recommendation that public drunkenness arrests be removed from the criminal justice process. The other exception is Aaronson, et. al. (1977) who call for a broader-gauged review of all police intake policies for the specific purpose of limiting intake. This, they say, should be one part of an overall scheme for

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34 Upon closer examination of burglary cases, however, it becomes clear that many of them are candidates for non-arrest. They often involve people who know each other and have had a dispute which spilled over into a technical commission of a felony, such as an estranged boyfriend who breaks down his girlfriend's apartment door to talk to her. Vera (1977:19) found that 39% of the burglaries in the New York City courts were between people who knew each other.

Table 7.1

NUMBER AND RATE OF ARRESTS FOR THE TEN MOST FREQUENT OFFENSES, 1965

Rank	Offense	Number	Percent of Total Arrests
1	Drunkenness	1,535,040	31.0
2	Disorderly conduct	570,122	11.5
3	Larceny (over & under $50)	385,725	7.7
4	Driving under the influence	241,511	4.9
5	Simple assault	207,615	4.2
6	Burglary	197,627	4.0
7	Liquor laws	179,219	3.6
8	Vagrancy	120,416	2.4
9	Gambling	114,294	2.3
10	Motor vehicle theft	101,763	2.1
	Total, ten most frequent offenses	3,651,333	73.7
	Arrests for all offenses[1]	4,955,047	100.0

1 Excludes traffic arrests.

Source: President's Commission on Law Enforcement and Administration of Justice, 1967:20.

seeking ways of reducing court caseload.

2. Release After Arrest by Police

Once an arrest has been made the next possibility for reducing costs is to have the police release the arrestee on their own authority without the approval of the prosecutor or a judicial officer. This mechanism of selective enforcement has a long and controversial history (McDonald, 1977). The Wickersham Commission (U.S. Commission on Law Observance and Enforcement, 1931b) commented favorably upon (but did not formally endorse) a Philadelphia Bar Association study that concluded that the police

should release defendants on their own authority. A decade later Professor Warner (1942), one of the prime authors of the Uniform Arrest Act, concurred with the view that the police should release after arrest in appropriate cases. Warner pointed out that this policy is desirable in situations where arrests have been made but shortly thereafter evidence comes to light that either exonerates the suspect or makes it clear that the case cannot be successfully prosecuted. Immediate release by the police saves both the defendant and the state the financial and social costs associated with pretrial detention. However, one of the obstacles of greater use of this method was in Warner's view the lack of clear legal authority for such police actions. Another obstacle is the fear that if the police are authorized to release on their own authority abuses may occur. The policy may encourage certain questionable police practices such as arrests for investigation and for harassment. This concern is shared by civil libertarians and police executives alike. The latter are particularly leery of having the power to release.

We found that release after arrest by police is not being used as a significant means of case screening in the majority of jurisdictions studied. Only 17 states provide the police with a clear affirmative power to take such actions, three additional states appear to grant such powers; 24 states clearly do not authorize the police to release after arrest; 6 seem to deny the power; and in one state the law was too unclear to classify (see Appendix A). In our telephone survey, we found that 67.5% of the responding police departments reported that they do not release

suspects after arrest on their own authority; and only 3 of the 13 police departments that said they do make such releases do so with any frequency. Comparing reported practices with the legal authority for them, it can be seen that it is not the lack of legal authority which prevents the police from using this mechanism of selective enforcement. Seventy percent of the jurisdictions reporting they do not release after arrest appear to have legal authority to do so if they chose to (see Appendix B).

Our field data parallel our findings from the telephone survey. In 11 of the 16 jurisdictions visited, the police have legal authority to release after arrest; but in only one was this practice common. There the prosecutor and the police officials estimate that over 50% of all felony arrests and about 55% of armed robberies are released after arrest by the police. An in-depth analysis of the nature of the cases being released was not available. But a glimpse of their nature and the reasons for the release is provided by examining the small sample of items taken from the police arrest log for a few days in one precinct (Table 7.2).

The reason, "no case," can mean any one of three things including the elements of the crime are not present, or there may not be any complainant, or the evidence is not strong. The decision to release an arrestee is made at the precinct station within one to two hours after arrest by the detective in charge of case review. A deputy chief explaining the procedure argued

Table 7.2

CASES RELEASED AFTER ARREST BY POLICE BY OFFENSE AND REASON, FOR JURISDICTION 13, JANUARY 1-8, AND MARCH 1, 1979

Offense	Reasons for Release by Police
Possession, stolen motor vehicle	Discharged, complaint refused to prosecute
Assault and battery	Discharged, no case
Assault and battery	Discharged, complaint refuses to prosecute
Felony assault	Discharged, no case
Armed robbery	Discharged, no case
Possession, stolen motor vehicle	Discharged, no case
Larceny from a building	Discharged, no case
Larceny from a building	Discharged, no case
Armed robbery	Discharged, no case
Felony assault	Discharged, no case
Felony assault	Discharged, no case
Felony assault	Discharged, no case
Unauthorized driving away automobile	Discharged, no case
Larceny from a building	Discharged, no case

that it only made sense to allow the police such discretion. His view was that in as much as the police are allowed to decide whether or not to probable cause existed at the time arrest, they should have authority to decide later that no probable cause existed, especially if new information comes to light in the interim. For example they should be allowed to decide that a drunk in the back yard was not breaking and entering after all. "You don't need to send a case to the prosecutor to make this decision," he reasoned. Furthermore, he believed that while 55% of the armed robberies were released by the police after arrest, at the time of the arrest there had been probable cause in the vast majority of these cases. For example, he suggested, they

police may have grabbed someone matching a description for a recent stickup, but at the show-up, the victim is not sure that is the defendant.

Within the scope of the present study it was not possible to address the various questions surrounding the police use the power to release after arrest. If it were more widely authorized by law and more generally used, would they use harassment? Would they arrest on less than probable cause? Would they show favoritism in their release decisions? Did the 55% of the armed robbery cases that were released in jurisdiction 13 actually have probable cause at the time of arrest? If not, was it because of the existence of the release-after-arrest policy? Did that policy foster a casual attitude among the police towards probable cause? These questions deserve to be pursued as part a of systematic reconsideration of the costs and benefits of a policy of using release after arrest as a major screening. In addition to the dangers listed above, this research should address other reservations about this policy expressed by the police themselves. These came from police in jurisdictions where they do not release after arrest. They prefer not to make such releases in order to avoid civil suits for false arrests, the appearance of favoritism, and the additional burden such responsibility places on them. They prefer the arrangement whereby they make the arrest decision and someone else makes the release decision. This not only protects their integrity but spreads the responsibility for the politically dangerous release decision to other agencies. One command-level officer put it succinctly: "I like

to be able to say to the guy I'm looking up, 'Sorry, fella. I just arrest you. Somebody else decides whether to you get out.'"[35]

Despite all these misgivings, a good case can still be made for encouraging more extensive use of release after arrest by the police. The argument is basically the same as it has always been. For one thing the suspect might be innocent. For another, it is costly to the state and the accused to hold a suspect in custody (or even process him through bail) until a review can be made by a judicial officer or prosecutor. In large jurisdictions with 24-hour, 7-day-a-week availability of prosecutors and judges, this may not be a problem. But in most jurisdictions such a review may not be available for 3-10 days. (The reviews that we observed which were performed by judicial officers of limited jurisdiction, such as commissioners and magistrates, appeared to amount to virtually no screen at all. We were told that these officers almost never find probable cause lacking.)

Authority to release after arrest is particularly relevant to the police in connection with the performance of their order

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[35] Our findings in this regard parallel those of Graham and Letwin (1971:643) who found that in Los Angeles County, California where the police have statutory authority to release defendants after arrest the power is not widely used. Instead, the practice in many police departments is to insist that cases be closed not by release but by a refusal of the District Attorney to issue a complaint. Some indication of the extent to which that occurs can be gleaned from statistics for 1967. In that year 20,615 felony arrestees were released in Los Angeles. During the same year the complaint section of the District Attorney's office refused to issue complaints in 15,090 cases in which they were requested.

maintenance functions. In several types of order maintenance situations, domestic disputes in particular, the police seize one party and remove him from the scene of the potentially explosive situation. The removal itself, is often the solution.[36] With increasingly limited justice system resources, it makes little sense to turn that simple solution into a costly matter for all parties by prohibiting the police from releasing after such arrests. For these reasons the matter of police authority to release after arrest needs further research and reconsideration.

3. Charging

A third mechanism of selective enforcement is through the charging decisions. There is an emerging consensus that this mechanism should be the one relied upon heavily to achieve the necessary screening function. However this consensus is still tentative; has not been implemented in many jurisdictions and is not feasible in some. Moreover, it has a deceptive clarity to it. It suggests that the charging decision is a singular decision point in the process and that it is entirely controlled by the prosecutor. In reality there are substantial differences in the structure of the charging stage of the criminal justice process. And these must be taken into account in assessing what kind and quality of screening can be achieved through the charging process. These differences and their implications are examined in-depth below.

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[36] At least the immediate solution.

4. Dismissals and Negotiations for Pleas and Dispositions

The last two mechanisms of selective enforcement are the dismissal of a case through nolle prosequi[37] and negotiations for pleas and dispositions. While nollies can occur only after the case has been charged, negotiations for pleas and dispositions can occur at any stage in the process. The bulk of such negotiations are for guilty pleas but some consist of deals in which the defendant agrees to provide some service such as testimony against a co-defendant in exchange for the case being dismissed. Plea bargaining has come under constant criticism and continues to be criticized by the police (Miller, et. al., 1979). In the controversy, two fundamental points are sometimes lost. Plea bargaining is part of the selective enforcement process; and, the nature and quality of plea bargaining is directly related to the operation of the overall screening process. In jurisdictions where effective screening has occurred at an earlier point in the process, the character and purpose of plea bargaining can be considerably different from that which occurs in jurisdictions without such early screening. Where there is effective early screening of cases, most cases going forward will be reasonably strong. Plea bargaining might still be used but primarily for the purposes of doing substantive justice in those cases where trial outcomes might be unfair or to dispose of

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[37] Also some cases are dismissed by the judge on his authority, but for our purposes we will focus only on dismissals by prosecutors.

otherwise strong cases for small concessions. In contrast, where there is virtually no early review of cases, post-charging plea bargaining will be forced to serve not only the above two functions but also the grosser functions of filtering out cases (for a plea) that would have been filtered out in other jurisdictions at an earlier point (and probably without a plea). Those cases that are not pled out will be nollied (which is often a long-delayed decision that the case should never have been charged).

Cases which do not get eliminated from the system until late in the process create considerable expense to everyone and are of problematic fairness to the defendant. The evenhandedness of plea bargaining is more difficult to maintain because case strength will vary more widely from case to case and, hence, the terms of the plea offers will have to be adjusted accordingly. Furthermore, because prosecution performance is usually measured on the basis of dispositions of cases that have been formally accused, prosecutors are loathe to screen out these cases without "getting something" out of them. Thus they are motivated to offer substantial concessions in weak cases in order to get guilty pleas. If this becomes known to the public and the police, their dissatisfaction with the whole process increases.

In sum, both plea bargaining and nolle prosequi are screening devices which should be used but, the nature of their use can vary. In a system without any early screening they become an inefficient, costly, demoralizing, and potentially self-defeating mechanisms of caseload management. In a system with early

screening, they can be used to make last minute adjustments in cases; to dismiss cases which became weak because of new developments; to provide small incentives to defendants to persuade them to not ask for jury trials; and to do all of this far more evenhandedly than in the other system. Further analysis of the police and prosecutor's roles in this part of the screening process is presented below.

D. The Suspicion and Arrest Stages

The first filters in the criminal justice system are at the suspicion and arrest stages. These are where the outer limits of the system's intervention into the lives of citizens are set. As we have defined it, the suspicion stage begins at some indefinite point when a crime that has been committed or suspected comes to the attention of the criminal justice system. It ends at the point where suspicion begins to focus on some individual(s) at which time the arrest stage begins. The latter ends with the booking of the arrestee(s). The two basic processes which occur in these two stages are the pre-booking investigation and the arrest.

In theory the prosecutor could play a major role in these stages of the justice process. He could participate in the policy development process governing intake policies as well as a variety of other policies governing the investigation and the arrest processes. He could also be of assistance in advising the police in the conduct of their investigations; questions of whether to arrest in particular cases; the preparation of arrest

and search warrants; the interrogation of witnesses; the approving of deals with informants and other undercover agents; and the conduct of line-ups and show-ups. Some states have given the prosecutor a legal obligation to participate in the suspicion and arrest stages of the process. In one state the prosecutor has the chief "responsibility for detection, arrest and conviction of criminals in his county" (State v. Winne [1953] 12 N.J. 152, 96th A. 63). In addition the prosecution has an ethical duty to participate in these stages of the process by conducting investigations not adequately pursued by local law enforcement agencies (American Bar Association, 1972a and 1979).

In practice, however, in jurisdictions included within the scope of this study (populations of 100,000 or more) the police almost exclusively dominate these two stages of the system and the processes that occur within them.[38] In a few jurisdictions

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38 Our findings in this connection are not generalizable to smaller jurisdictions. LaFave (1965:515) reports that "the rural prosecutor is more likely to play a significant role in the development and carrying out of a law enforcement policy than is the urban prosecutor. He is accessible to the police and in some situations may be regularly consulted prior to arrest."

During the course of our project a television broadcast on the public broadcast system described the administration of justice in a rural county in New Hampshire. There the local prosecutor indicated tat he did all the investigations in cases because the police did not have the necessary knowledge or experience.

At professional conferences of prosecutors we talked with a few prosecutors from jurisdictions of less than 100,000. Some of them indicated that either they or their predecessors had taken a major role in certain aspects of the investigative function in their jurisdiction. One practice in particular was often mentioned, namely, prosecutors going
(Footnote continued)

there was virtually no direct interaction between police and prosecutors in the suspicion and arrest stages. The police did all the pre-booking investigation and arrests without consultation, advice or cooperation from the prosecutor's office. In other jurisdictions prosecutors were involved in a variety of limited ways in these two stages. In general, however, with a few limited exceptions prosecutors have not made a concerted effort to participate as fully as they might in the suspicion and arrest stages. The types of involvement that do exist and their variations among jurisdictions are described below.

1. Prosecutor Advising the Police

In its Standards on the Prosecution Function, the American Bar Association (1979:§ 3-2.7) states: "The prosecutor should provide legal advice to the police concerning police functions and duties in criminal matters."[39] However, McIntyre (1975:206) found that this standard is largely ignored. In his survey of 247 high ranking police and prosecutor officials, he inquired as to the extent to which prosecutors advised the police on certain legal and other issues. For each issue cited (including: search and seizure, line-ups, confessions, warrant approval, police

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38(continued)
on raids with the police. One prosecutor indicated his disapproval of such a practice and reported that when he took office and refused to accompany the police on raids. They took this to mean that he was being uncooperative with them.

39 The necessity for such advice is particularly acute in police departments that cannot afford their own in-house legal counsel.

behavior as witnesses, and allocation of police manpower and resources) the majority of the police respondants indicated that they never received advice from prosecutors or received it only irregularly ("as the law changes" or "when requested" or "as necessary"). With regard to fundamental issue of the allocation of police manpower and resources, 81% of the police reported that they never received advice from prosecutors on this issue, and 70% of the prosecutors said they never gave the police advice on this matter.

We inquired into the extent to which the prosecutor made himself available to the police for advice of various kinds. Remarkably, our telephone survey found that 90% of the 39 responding prosecutors' offices indicated they had a prosecutor available to the police on a 24-hour basis (see Appendix C). Also in our field visits we found that in 75% of the 16 jurisdictions the prosecutor's office was available at least by telephone; and in 25% of them the prosecutor would respond to the scene of an arrest or crime on request of the police (Table 7.3). However, the existence of these arrangements by themselves did not guarantee their use.[40] Police officers would only call on prosecutors for advice if they knew the particular prosecutors

[40] In 1965 the Los Angeles District Attorney's Office established a service in which a deputy district attorney was available 24 hours per day, 7 days a week to give the police legal advice and prepare arrest and search warrents. Five years later Graham and Letwin (1971:642) found little evidence that the police were using this service. Most of Graham and Letwin's informants reported that it was rare for the District Attorney on that duty to get any calls from the police.

and trusted his judgment. In fact, a special new kind of "prosecutor shopping" by the police has been created by the existence of these on-call systems. To some extent this "shopping" was done by the police to get prosecutors with "sympathetic" attitudes toward the police. But the key consideration seemed to be to get a prosecutor who the police officer had worked with in the past, had already established informal ties with, and whose opinion he regarded as trustworthy.

Table 7.3

FREQUENCY OF DIFFERENT TYPES OF PROSECUTORIAL AVAILABILITY TO THE POLICE

Type of Prosecutorial Availability	Percent of Jurisdictions [N = 16]
No special arrangements exist	25%
On-call telephone or intramural office advice	50%
On-call for telephone advice and roll-out to crime/arrest scene	25%
Prosecutor assigned to police station	0

In addition to the matter of prosecutorial availability to the police for advice on individual cases, we inquired about advice on general policies. We asked the chiefs of police attending the National Executive Institute of FBI Training Academy about the frequency with which common policy guidelines on any aspect of law enforcement had been jointly developed with the prosecutors in their jurisdictions and what kinds of subject matter were covered by such guidelines. Eight of the 13 usable responses indicated that such police guidelines are set "quite

often," "frequently," or "as often as necessary," (Table 7.4). The range of subject matters covered by these guidelines is considerable--although none specifically mentions the important matter of the allocation of the police manpower and resources. Thus, our findings based on this sample differ somewhat from McIntyre's. They suggest that for these medium to large size police departments, the prosecutor is more likely than not to be providing the police with advice in developing police guidelines.

2. Prosecutor Control of the System Intake (Investigation and Arrest) Decisions

If the prosecutor is to eventually emerge as the true "chief" law enforcement officer in his jurisdiction and manager of the criminal justice system, he will have to concern himself with the initial, system intake decisions. At the moment, most prosecutors are not presently concerned with or involved in trying to govern (either directly or indirectly) the arrest and initial investigation decisions. In this regard our findings general parallel McIntyre's (1975:207). Ninety-five percent of his prosecutors never or irregularly gave police advice on allocating their manpower and resources. He concluded that "[p]olice control of the number of cases initiated did not appear to be a source of frustration to prosecutors in that rarely have I heard a prosecutor complain about it. What does concern them, however, is lack of prosecutorial control over the quality of evidence on which a conviction depends" (1975:211).

Table 7.4

FREQUENCY WITH WHICH COMMON POLICY GUIDELINES ON ANY ASPECT OF LAW ENFORCEMENT HAVE BEEN JOINTLY DEVELOPED BY POLICE AND PROSECUTORS AND SUBJECT MATTER COVERED AS REPORTED BY POLICE CHIEFS *

Jurisdiction	How often are common police guidelines jointly developed? [verbatim responses]	What topics are covered? [verbatim responses]
A	Quite often	Vice crimes--evidence required, etc.
B	Recent	Major criminals--white collar--drugs.
C	Frequently	Case review. Police oh-call program. First offender program. Career criminal program. PROMIS.
D	Often as needed	Intake procedures, subpoena procedures.
E	As often as necessary. Monthly meetings held at various levels within both depts.	Variety of areas.
F	Yes, formally	Informants; investigative activities.
G	Frequently	Organized crime cases; traffic fatality cases.
H	Often	Prosecution criteria.
I	Frequently	Complaint issuing.
J	No, not yet	
K	--	All major matters.
L	Few	Warrant applications, crime lab evidence, copies of police reports.
M	Often	Arrest--warrants--witness-etc.
N	None	--

Jurisdictions in this sample (arrangement is not in the same order as responses: Birmingham, AL.; Alameda Co., CA.; Long Beach, CA.; Los Angeles, CA.; Sacramento, CA.; Washington, D.C.; Ft. Lauderdale, FL.; State of Michigan; St. Louis MO.; Tulsa, OK.; Austin, TX.; Houston, TX.; Canada; Vancouver, B.C.

Typical of most prosecutors' attitudes toward the police control of the intake decision was that of the chief deputy prosecutor in jurisdiction 10. He explained that he and his chief did not care that the police were making numerous arrests for obscenity, pornography and other vice cases even though his office was dropping them out of the system immediately. He felt the police had to respond to pressure from the citizens using the shopping centers where the adult book stores and "body shops" had opened up even though the police knew the prosecutor would reject those cases.

However, in three of our sixteen jurisdictions (19%), chief prosecutors had become concerned with the police intake decision and had taken steps to control it. Two of the jurisdictions were among the largest jurisdictions in our sample. The prosecutors there explained they were trying to prevent the police from amassing arrest statistics simply for their public relations value. These prosecutors wanted to prevent the misleading impression of effectiveness of the criminal justice system created by such statistics. They also wanted to preserve the substantial amount of criminal justice system resources expended by such cosmetic endeavors. Their views are illustrated below.

Illustration #7.1

In jurisdiction 8 the chief prosecutor tried to get the police department to allow the prosecutor to review cases between the apprehension and the booking of the suspects. The purpose of the review was to release cases the prosecutor knew would be eventually released at that earliest point in order to save the expenses involved in formal booking and initial processing of suspects. Playing devil's advocate we argued with the prosecutor that it was not his responsibility to worry about the costs involved in this stage of the process

because they were all borne primarily by the police and the courts. He retorted that he defined his responsibility as not limited to preserving the resources of the prosecutor's office but those of the entire criminal justice system as well. However, the proposed program was not implemented for several reasons. Officially, the police took the position that it would be improper to release suspects under the proposed policy because there would be no record of the arrest and this could lead to abuses as well as civil suits. Unofficially, the police general counsel, a former assistant prosecutor, indicated that the police felt the prosecutor "did not have the guts to screen cases out on his own authority and was trying to get the police to take the heat for something he should be going."

Illustration #7.2

In jurisdiction 7 the chief prosecutor was also concerned with the police intake decisions. The local police department was known for being "statistics conscious." He believed that many of the arrest-related decisions were done solely for cosmetic value. Therefore, he took some limited steps to put an end to this. He refused to issue indictments in cases where the police did not have a suspect under arrest. In other words, he refused to issue arrest warrants. He explained this policy to us as follows. Ten years ago he had 10,000 non-arrest indictments "floating around." He said the police would typically stop working on a case as soon as they had it cleared by indictment. Once the indictment was issued the police would not serve it because the incentive to go further had been removed. The police had gotten their arrest statistic. Thus, they were generating work for his office which was not resulting in cases being processed.

Furthermore, he pointed out, "You can't screen an arrest warrant." The police would "inflate" the strength of the case in their reports to the prosecutors and were able to get warrants in weak cases. Therefore, the prosecutor implemented an additional policy. He refused to charge cases unless the police brought the complaining witness with them to the prosecutor's office. Previously they had done this in only 10% of the cases. Currently they are doing it in 90% of the cases.

Furthermore, the prosecutor refuses to exercise his authority under a particular rule of criminal procedure that says "the district attorney shall discharge the defendant when as a matter of law no crime has been committed." He refuses to do that

because "it gives the cop a statistic. The cop gets an arrest with the disposition entitled, "no processing."

The third chief prosecutor attempting to control the police intake decision was in a smaller jurisdiction and was not primarily concerned with controlling criminal justice system costs or the selection of targets for criminal prosecution. Rather, his efforts were designed to control the quality of the cases brought in, that is, the extent of the investigation in the case. As in other jurisdictions this prosecutor had found that the police did insufficient investigation before the arrest and were not motivated to improve the investigative effort after the case had been filed in court. Therefore, he tried to increase the proportion of all arrests which are made with warrants, the issuance of which is controlled by his office. The police have to come to him first before making arrests.

3. Non-Routine Case Processing

The above findings about the lack of prosecutorial control over or participation in the suspicion and arrest stages accurately describe the majority of cases. Most cases in most jurisdictions enter the system of justice after a warrantless arrest made by the police and are routinely processed according to normal channels through the system. But, this routine differs in some jurisdictions for a small minority of cases which for special reasons are processed differently. In these exceptional cases the prosecutor may play a significant role in the suspicion include: (a) "grand jury originals" (cases where an indictment is secured by the prosecutor before an arrest is made--a tactic used

in various circumstances including investigations that need to proceed in secrecy); (b) arrests on warrants (frequently used in undercover drug investigations; and in some jurisdictions controlled by the prosecutor); (c) selected cases for which the prosecutor has a policy of responding to the crime or arrest scenes (such as murders and police shootings); (d) selected crimes which because of their legally complicated nature are investigated primarily by prosecutors (such as white collar and economic crimes); (e) special strike forces (in which police and prosecutor teams work cases together from the suspicion through the sentencing stages); (f) dealings with informants in jurisdictions where the prosecutor requires the police to clear all such deals with his office. In jurisdictions where these arrangements occur they appear to improve the quality of justice administered without damaging the relationship between the police and the prosecutor. They represent means by which the prosecutor could extend his participation in the earlier stages of the criminal justice process.

E. The Charging Stage: A Domain Divided

The charging stage of the criminal justice process is a crucial location for the early and accurate screening of cases. Yet despite its importance there are numerous issues which remain unclear such as who controls this stage; what its boundaries are; what the relationship of the initial charging decision to the final charging decision is; what factors determine whether a case will be processed by either indictment or information; what the consequences of these alternative routes are; and what the

typical roles of police and prosecutors are in this stage of the process. Generalizations about the structure and operation of the charging stage are risky because there are substantial variations among jurisdictions in the way this stage is organized. These variations must be taken into account in planning policies designed to use charging as a major case filtering mechanism.

The analysis below begins with some distinctions and then describes variations in the social organization of the charging stage and the significance of these variations. The conflict between police and prosecutors regarding charging is reexamined within these distinctions. This section concludes with an assessment of the feasibility of using charging as a major selective enforcement mechanism.

1. Some Clarifications

Typical of the misleading descriptions of charging that exist in the literature is that of Chambliss and Seidman's (1971:395) who quote LaFave as authoritative:

> "The typical situation surrounding criminal prosecution is characterized by Wayne LaFave as 'one in which the police make an arrest without a warrant and then bring a suspect to the prosecutor with a request that he approve the issuance of a warrant. The decision to arrest is clearly made by the police. The decision as to whether to charge the suspect and the selection of the charge are the responsibility of the prosecutor. The prosecutor's charging decision is manifested by his approval or refusal of the issuance of a warrant.'"

This description is misleading in several respects. It is apparently based on a set of rules of criminal procedure whereby all felony cases must begin with a warrant approved by the public

prosecutor. That arrangement does not exist in many states (Miller, 1969). It also assumes that prosecutors review cases before they are initially filed in court. In our sample of 16 jurisdictions this was true in less than one-third. Finally, it is misleading in conveying the impression that the decision to issue or refuse a warrant is synonymous with the charging decision. What in fact constitutes the charging decision is one of the cloudiest matters in the criminal justice literature. Miller (1969:12) correctly argues that the charging decision should not be identified with any one decision point but should be regarded as a process:

> "The decision to charge, unlike the decision to arrest, is not a unitary decision make at a readily identifiable time by a specified individual. It is, instead, a process consisting of a series of interrelated decisions, and that steps in the process do not always occur in the same sequence."

Miller's point is well taken; but, his analysis has also contributed somewhat to the lack of clarity about charging. For example, he suggests (1969:11) that the main focus of analysis of the charging process should be the actions of the prosecutor:

> "In some instances, the effective (charging) decision is made when the police decide not to ask the prosecutor to charge, but to release the suspect instead. Of greater significance are the decisions made by prosecutors, acting through their assistants, whether to charge suspects already in custody, in response to requests made by the police that they do so."

In his subsequent analysis Miller focuses exclusively on that part of the charging stage in which the prosecutor is involved. The reader easily comes to the erroneous conclusion that the charging stage of the American justice process is co-terminous

with the prosecutor's involvement in a case. That same impression has unintentionally been fortified by the more recent research of Jacoby (1977) who also concentrates her analysis of the charging process to that portion in which the prosecutor is involved.[41]

In our discussions with police and prosecutors about the charging decision we found that a frequent point of confusion is the differences between: (a) initial charges (sometimes called "police charges"); (b) formal charges (i.e., the final accusatory instrument filed in court, either the indictment or information); and (c) something known as the prosecutor's "screening," "early case review," or "charging" decision. This third category is sometimes and synonymous with either the initial charging decision or the formal charging decision or a separate decision which occurs somewhere between the initial and the formal charging decision. In short one finds in the field at least three different things being indiscriminately referred to as "the charging decision." In order to deal with this ambiguity we found it necessary to develop our own definition of the boundaries and component parts of the charging stage and its subdivisions, and then place these different prosecutorial decision points within them.

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41 However, she does warn that in some jurisdictions the prosecutor's function has been "transferred" to some other official such as the police or the judge.

Figure 7.1

SELECTED STAGES, ACTIVITIES AND POINTS OF PROSECUTORIAL INTERVENTION IN THE CRIMINAL JUSTICE PROCESS

Stages and Substages	Arrest Stage		Charging Stage			Post-Charging Pretrial Stage
	Apprehension Substage	Booking Substage	Initial Charging Substage	Formal Charging Substage		
Boundaries	Seizure of suspect	Booking	Filing initial complaint in court		Filing formal accusation in court	
	A	B	C	D	E	F
Models of Prosecutorial Intervention in Charging Process	Pre-apprehension model	Pre-booking model	Federal model	Intermediate model	Late model	Colonial model
Other Activities & Decisions *		PTR NEGO	PTR NEGO PCH	PTR NEGO PCH	GJ	NEGO

* PTR = Pretrial release decision
NEGO = Negotiations for pleas and other dispositions
PCH = Probable cause hearing
GJ = Grand jury

The charging stage is best thought of as beginning after the police have booked an arrestee and ending when the formal accusatory instrument has been filed in court, see Figure 7.1. This stage can be subdivided into the initial charging substage (which ends with the filing in court of the initial complaint) and the formal charging substage (the balance of the stage). Within the charging stage four significant activities and decisions may occur in addition to the charging decision. The pretrial release (bail) decision is made and may be reviewed more than once. One or more hearings or ex parte decisions by judicial officers and possibly by the grand jury are made regarding the presence of probable cause. And, negotiations by police or prosecutors with defendants for pleas and other dispositions and services may occur. The ultimate formal charging decision involves the selection of the number, level and kind of charges to be filed in the formal accusatory instrument. Of course, if a case is rejected or dropped prior to the formal charging decision being filed the decision to drop the case constitutes the de facto charging decision regardless of who makes it.

2. Variations and Consequences

In theory the prosecutor's office could intervene and control the decision making in the criminal justice process at any one of six different points, as indicated by the capital letters in Figure 7.1. The preapprehension model (A) wherein the prosecutor intervenes before the suspect is seized is infrequent but does occur. It happens in jurisdictions where arrests are made with warrants which have been approved by the prosecutor.

It also happens in those few cases that occur in many jurisdictions where the arrest is made on the basis of the warrants issued as grand jury originals obtained by the prosecutor. The pre-booking model (B) wherein the prosecutor intervenes between the arrest and the booking decision does not occur in any jurisdiction with which we are familiar. But, in jurisdiction 8 the prosecutor tried to implement it but the police refused to cooperate. He wanted to prevent the excessive number of "inappropriate" arrests from entering the system even as far as the booking procedure. He proposed to have his office review all incoming arrest before booking and release those which did not merit further effort. The police chief refused on the grounds that once a seizure had taken place the police had to book the suspect and make a record of the transaction. Otherwise there would be no way of accounting for those arrests that resulted in releases. This would be dangerous to both the public and the police. Real or imagined abuses could occur and the police would be unable to respond to them.[42]

The most common models of the social organization of the charging process are the federal model (C) in which the police bring all cases directly to the prosecutor for review before the case is filed in court; the "intermediate" model (D) in which the

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42 It should be noted that in other cities such as Washington, D.C., the police department has developed a procedure for dealing with the situation described here. If the police release an arrestee within four hours after arrest, his name is kept in a confidential arrest log not open to public inspection.

police file the case in court themselves and 3 to 10 days later review the case with the prosecutor at which time the prosecutor makes his basic charging decisions; the "late" model (E) in which the prosecutor reviews the case several weeks after arrest and after the preliminary hearing, usually in connection with presenting the case to the grand jury; and the colonial model in which there is virtually no prosecutorial screening or independent judgment about the charges.

If all jurisdictions had the federal model of charging, then nothing in the charging stage would fall outside the prosecutor's domain; analyses of the charging process such as LaFave's, Miller's and Jacoby's would be generalizable to the charging process everywhere; and, the emerging consensus that charging should be governed by the prosecutor and operated as a major, early filtering mechanism could be readily implementable. But, all jurisdictions do not have the federal model. Moreover, it is problematic whether the federal model can be afforded by many jurisdictions; and, whether it would be desirable even if it were affordable.

In our sample of 16 jurisdictions, six (37.5%) have the federal model, six (37.5%) have the intermediate; three (19%) the late, and one (6%) has the colonial model (see Table 7.5). Our larger sample, drawn on a nationally representative basis (from jurisdictions over 100,000 population), indicates that in the majority (51%) of jurisdictions in the country the police do the initial charging; in only 36% do the police file all cases directly with the prosecutor (the federal model); and in 13% the

filing structure is either optional with the police or split on the basis of whether the case is a felony or misdemeanor (see Table 7.6).

Table 7.5

FREQUENCY OF ALTERNATIVE MODELS OF PROSECUTORIAL INTERVENTION IN THE CHARGING PROCESS

Models of Prosecutorial Intervention	Number	Percent	Jurisdictions
Federal	6	37.5	7, 9, 14, 13, 6 & 12
Intermediate	6	37.5	16, 4, 11, 15, 8 & 10
Late	3	19	3, 5 & 1
Colonial	1	6	2
Total	16	100%	

Table 7.6

FREQUENCY OF JURISDICTIONS WITH PROSECUTORIAL CONTROL OVER THE INITIAL CHARGING DECISION *

Type of Initial Charging Structure	Jurisdictions [N = 39]
a. Police file cases directly with the courts	51%
b. Police file cases directly with the prosecutor's office	36%
c. Police have the option of filing with court or prosecutor; or, felonies are filed one way, misdemeanors another	13%

* Based on national sample of jurisdictions over 100,00 population stratified by size.

The four variations in the organization of the charging

process have substantially different implications regarding costs, feasibility and desirability. The federal model appears to be the one which some national groups have in mind in recommending that the prosecutor assume control of the "charging" decision (American Bar Association, 1979:§ 3-3.4; and National District Attorneys Association, 1977). It has several advantages stemming from the fact that in it the prosecutor controls the entire charging stage. This means that the initial case review will occur early in the process and hence can be used to maximize the social and financial benefits associated with early dismissal of cases as well as more accurate charging of cases. In jurisdictions which do not have the federal model the police control the initial charges. This has several disadvantages. The "police charges" on the document filed in court (the complaint) become the official charges for purposes of holding a person in custody or setting bail. In misdemeanor cases these charges become the formal charges (unless they are subsequently revised by a prosecutorial review). In as much as most police departments do not release after arrest, all cases get filed in court. Also, because the police tend to "over-charge" cases (i.e., file the most serious and/or largest number of charges supported by the evidence) some cases are shunted into the felony processing route which will have to be reprocessed later. In addition, in the numerous jurisdictions where the initial bail decision is mechanically determined by the nature of the police charges, the costs of pretrial release and detention are increased for both the defendant and the community.

There are still other disadvantages of not having the prosecutor control the initial charging decision. Once the police file their cases in court they feel they have passed on the responsibility for the cases to the prosecutor. This makes it more difficult for the prosecutor to subsequently get follow-up investigation done by the police.[43] If the follow-up work is eventually done, it may be too late. Evidence and witnesses may have disappeared or memories faded. In some jurisdictions the new "speedy trial" rules requiring that trials begin within a certain number of days start their "clocks" with the initial filing of the case in court. The charges filed by the police become part of the public records system and hence to the extent that these charges are inflated or inaccurate the integrity and value of the community's record system is diminished. The official picture of the court's caseload will exaggerate the true nature of the local crime problem. When in the future these records are consulted by criminal justice officials trying to determine a person's prior record, these inaccurate charges will be misleading. Finally, where the police control the initial charges, it is easier for the practice of imposing "police time" to flourish. This is the police practice of charging defendants in problematic cases knowing the charges will ultimately be dropped but forcing the defendant to serve the unofficial penalty of being detained pretrial or pay the cost of a bail bond.[44]

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43. It was for that reason alone that one prosecutor converted his jurisdiction to the federal model, see discussion in section D.2. above.

All of these disadvantages of allowing the police to control the initial charging decision are minimized or eliminated by having the prosecutor control of the charging stage from the very beginning. But, the potential benefits of the federal model are off set in part by deficits which make it a less desirable arrangement than suggested by some national professional groups. The two key drawbacks are cost and time constraints. The federal model requires a prosecutor be virtually always available to review police charges. If the review were done in person, then the costs would be prohibitive for many medium and small jurisdictions. They would have to include either the salaries to support the several prosecutors needed to staff the many lower courts which are typically scattered at considerable distances throughout a jurisdiction or the costs of having police officers travel to a central location so that one prosecutor could do the review. If the review were done via telecommunication linkages

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44 The rationale for this practice is captured by the expression, "they (defendants) might beat the rap but they won't beat the ride."

Giving complete control of the charging process to prosecutors will not eliminate this practice. Some prosecutors engage in a similar practice. They have told us they deliberately do not drop charges in certain cases until the defendants have retained attorneys and/or been processed through the system a bit. One prosecutor who had done this to a middle class girl charged with marihuana possession explained that by forcing her to retain an attorney at an estimated cost of about $500 he had imposed a more severe penalty than that provided by law. He eventually dismissed the case after he had "broken her of sucking eggs."

This type of abuse, however, is less likely to occur in a system where the initial charging decision is not only controlled by the prosecutor's office but also guided by office policies.

then the costs could be more manageable and could possibly be offset by the benefits.[45]

The other main disadvantage of the federal model arises from the legal requirement that cases must be filed in court (and, hence the initial charging decision made) "without unreasonable delay." In some jurisdictions this means as much as 72 hours after arrest. In one it is no more than 12 hours after arrest. This time constraint severely limits the amount and quality of information gathering that can occur between arrest and the initial charging decision. Additional witnesses cannot be contacted and reinterviewed; crime scenes may not be thoroughly searched; alibis may not be checked out; drugs not analyzed; guns not tested; line-ups and photo arrays not done; prior arrest records, especially out of state records, may not be completely checked; other pending cases in the system may not be discovered; probation and parole officers not contacted; and medical reports on victims not received. Therefore, when the prosecutor in the federal model makes his charging decision he may not have available to him certain pieces of critical information that would definitely affect his charging decision. Moreover, at this point

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45 The cost would be minimal if the linkage consisted of nothing more than the telephone. Such an arrangement has been used successfully in one medium sized jurisdiction but it failed in a large jurisdiction. The prosecutors in the later jurisdiction found it was essential to be able to see and get "hard copies" of the charging documents the police were completing at the time of charging. This required more expense document transmission equipment. Assuming other jurisdictions would also find such equipment necessary the costs of the linkage would be increased accordingly.

in the process the victim is still emotionally committed to having the case prosecuted; but within a few days many victims will have cooled off and lost their personal commitment to the prosecution. If the basic charging decision is made while the "blood is still hot" many of those cases will have to be subsequently screened out when the blood has cooled.

For these reasons, the charging decision in the federal model is likely to be wrong in its estimate of the strength of the case and in terms of the seriousness of the defendant. Getting the information necessary to make better estimates of these two critical factors in the prosecutor's charging decision takes time. In this regard, the "intermediate" model is superior. It achieves the efficiencies associated with a reasonably early case review but the review is late enough in the process to allow the decision to be based on more information. The charging decisions are less likely to err in the direction of in correctly estimating the true "value" of the case, whether it should be allowed to proceed further, and, if so, with what charges.

The main disadvantage of the "intermediate" model (something it shares also with the late and colonial models) is that the prosecutor does not control the entire charging process. Consequently the many disadvantages of allowing the police to control the initial charging decision operate. But, although the intermediate model does not control these negative consequences as well as the federal model, it does reduce the impact of certain of them. Moreover, it is far superior to having the

prosecutorial review located after the preliminary hearing or be virtually nonexistent.

The intermediate model of prosecutorial intervention in the charging process strike appears to the best compromise between the need for early case review by a prosecutor, the limitations on the availability of the prosecutorial staff for review, the cost of staffing a review before initial filing, and the need for sufficient time to gather the information necessary for an adequate case review. While we agree with the American Bar Association's (1979:§ 3-3.4) and the National District Attorneys Association's (1977) desire to have the prosecutor control the charging decision, we take exception to some of the specifics of their position. For example, the American Bar Association states that in contrast to what was true in the past it is currently feasible in all jurisdictions to have the prosecutor control the initial charging decisions. However, we found that in the majority of the jurisdictions studied this was not currently being done; and in several it would be financially impractical to do on an in-person basis (and possibly not cost efficient to do on telecommunications linkage basis).

Furthermore, even where it is financially feasible we can not endorse without qualification the American Bar Association's suggestion that prosecutorial screening should be done before the case is initially charged. For the reasons already enumerated it is desirable (where it can be afforded) to have the prosecutor rather than the police set the initial charges. But it is not in the best interest of good case screening to require the

prosecutor to make this initial screening decision simultaneous with his final charging decision. Careful case review requires more information about the defendant, the crime, the witnesses and the strength of the case than is usually available within 12 to 72 hours after arrest. The best location for the intensive case screening decision is at a separate prosecutorial review of the case within three to seven days after arrest.

3. Charging Standards

If the charging function of the prosecutor is to be one of the major mechanisms of selective enforcement and if this selection is to be done in accordance with the jurisprudential requirements of American law, then it must not only be located at an appropriate point in the process but also employ appropriate standards for case review. The constitutionally required standard for charging is probable cause. As the Supreme Court said in Bordenkircher v. Hayes, 434 U.S. 357 (1978):

> "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."

However, Katz (1972) has pointed out that constitutional standards must be regarded as minimum standards below which the Constitution will not permit the government to go. They are not maximum standards. The government is not prohibited from setting higher standards. Several standard-setting groups and some local prosecutors have realized this and have established charging standards that are higher than probable cause. The National

District Attorneys Association 1977: § 9.4) has recommended:

> "The prosecutor shall file only those charges which he believes can reasonably be substantiated by admissible evidence at trial."

The California District Attorneys Association (1974) has recommended that cases should not be charged unless evidence "warrants conviction." In Florida, the prosecutor's charging standard has been moved from probable cause to something approximating beyond a reasonable doubt by the Florida Supreme Court (February 4, 1974):

> "Before filing an information, every State's Attorney should not only seek probable cause in his investigation, but also determine the possibility of proving the case beyond and to the exclusion of every reasonable doubt. If the latter cannot be accomplished no information should be filed and the defendant should be released."

The National Advisory Commission on Criminal Justice Standards and Goals (1973:§ 1.1) recommended:

> "An accused should be screened out of the criminal justice system if there is not a reasonable likelihood that the evidence admissible against him would be sufficient to obtain a conviction and sustain it on appeal. In screening on this basis, the prosecutor should consider the value of a conviction in reducing future offenses as well as the probability of conviction and affirmance of that conviction on appeal."

In its commentary on this standard the Commission does not recommend any particular level of probability of conviction. Rather it states that the level should vary according to circumstances (e.g., be lower for more serious defendants). The Commission states that the main point of its screening standards is that the minimum standard of probable cause alone should not be the test of whether a case is permitted into the system.

Rather there should be an open recognition that many cases now brought (mostly by the police) to the system with probable cause must be rejected "when [in the judgment of the prosecutor] the benefits to be derived from prosecution or diversion would be outweighed by the cost of such action" (id.).

These calls for higher standards at charging are being heeded. Our telephone survey found that the majority (58%) of the prosecutors' offices surveyed report using a charging standard higher than probable cause. However, a substantial proportion (39%) report they are still using the minimum probable cause standard (see Table 7.7). Findings from our field visits

Table 7.7

FREQUENCY OF DIFFERENT CHARGING STANDARDS USED BY PROSECUTOR OFFICES

Charging Standard	Percent of Prosecutor Offices Using Standards [N = 36]
Probable Cause	39%
Beyond a directed verdict	14%
50/50 chance of conviction	11%
"High probability" of conviction	14%
Beyond a reasonable doubt	19%
No set standard	3%

parallel the telephone survey results. The majority of jurisdictions visited (56%) claimed to be using a charging standard Higher than probable cause. However, as encouraging as these results are, they must be viewed with some skepticism about their

validity and reliability. Determining what the actual charging standard is in a jurisdiction is not easily done by asking prosecutors to report their standards. We frequently found that standards were not crystalized in formal, written policy form; that different prosecutors within the same jurisdiction give different reports on what the real standard in practice was; and that standards often varied depending upon the nature of the case involved. Furthermore, differences in the official charging standards did not appear to be related to differences among jurisdictions in their case attrition rates as one would expect. For instance, in jurisdiction 12, the official charging standard was the rather high standard of the California District Attorneys Association. It required that a case not be charged unless the evidence "warranted conviction." In fact, the chief prosecutor was one of the leading developers of that standard. However, in his jurisdiction virtually no cases dropped out of the system at the prosecutor's initial charging review. Of course, it may be that the police in that jurisdiction bring in only strong cases which "warrant conviction." But, there was no reason to believe that the police there were much different than elsewhere. Rather, it seemed more likely that the official charging standards had little practical meaning.

4. Legal Factors Affecting the Charging Process

The nature of the charging process, the significance of the police role in it, and the ability of the prosecutor to efficiently use it as a filtering mechanism are determined by several

factors. Three have already been mentioned: timing, location, and the standards used. Two other kinds of factors bear mentioning: legal factors and the chief prosecutor's definition of his role.

It has often been noted that the American prosecutor has substantial discretion (Davis, 1971 and 1976). However, that discretion varies in important ways. Some legal provisions increase his discretionary powers while others restrict it or make his job more burdensome. The prosecutor's power at charging is increased if the criminal code is not systematically codified and if multiple statutory provisions exist for the same offense. Under these circumstances the prosecutor can add numerous charges to the indictment and use them in plea bargaining. On the other hand in jurisdictions where the law prohibits the jury from finding lesser included offenses, the prosecutors are placed under the additional burden of listing all possible charges as well as lesser included charges in the accusation. In jurisdiction 16 where this arrangement exists it forced the prosecutor to "overcharge." He had to put every possible charge into the formal accusation because if the jury did not convict on one of the charges all the other possible charges had to be there. Otherwise, the case would fail completely.

The law can also make the charging process more burdensome on the prosecutor if it requires that the language used in the formal accusation be cast in specific language or the archaic language of the common law. In jurisdiction 4 assistant prosecutors struggle to fill out simple misdemeanor charges until they

become familiar with the required archaic language. However, an analysis of the charging language required in the 50 states and the District of Columbia (see Appendix D) indicates that only five of the 51 jurisdictions appear to leave the prosecutor little leeway in the language used in the formal accusation. Thus, in most jurisdictions it appears that this is not a burden for prosecutors.

A further analysis of the legal restrictions on the prosecutor's discretion in charging focused on the degree to which the prosecutor's power to formally accuse a person is unhampered by checks and procedures. There were two dimensions to this. One has to do with the way formal charges are filed. The other has to do with how they can be amended.[46] The statutory provisions regarding to these two points are presented in Table 7.8. It shows the simultaneous relationship between restrictions on the filing of the formal charge and restrictions on the amendability of the formal charge. The greatest degree of prosecutorial discretion in charging would occur in a jurisdiction with no restrictions on either the filing or the amending of formal charges. This occurs in only one jurisdiction (Wisconsin). In contrast, jurisdictions where the prosecutor has the least power (discretion) in charging are those where the filing of charges for all felonies and misdemeanors must be by a grand jury indictment (or similar restriction, such as only by

46 This line of analysis was prompted by the report in one jurisdiction that the prosecutor was largely bound by the initial charging decisions of the police.

Table 7.8

LEGAL STRUCTURAL LIMITATIONS ON THE PROSECUTING ATTORNEY'S DISCRETION TO FILE AND AMEND THE FORMAL CHARGE

		Amendability of Formal Charge: Unrestricted at some point in proceedings		Restricted at every point in proceedings		Total Number of Jurisdictions	
Filing of the Formal Charge	Unrestricted in all cases	1[a]	2%	8[b]	16%	9	18%
	Unrestricted except for capital crime or crimes punishable by life imprisonment	1[c]	2%	5[d]	10%	6	12%
	Unrestricted only for non-indictable or non-infamous misdemeanors	1[e]	2%	15[f]	29%	16	31%
	Restricted in all cases	2[g]	4%	18[h]	35%	20	39%
Total Number of Jurisdictions		5	10%	46	90%	51	100%

[a]Wisconsin.

[b]Arkansas, Illinois, Indiana, Michigan, North Dakota, Vermont, Washington, Wyoming.

[c]Connecticut.

[d]Florida, Louisiana, Minnesota, Pennsylvania (in the counties where the grand jury has been abolished), Rhode Island.

[e]Oklahoma.

[f]Alabama, Akaska, Delaware, District of Columbia, Georgia, Hawaii, Kentucky, Maryland, Mississippi, Missouri, New York, Ohio, Oregon, Texas, Virginia.

[g]South Dakota, Montana.

[h]Arizona, California, Colorado, Idaho, Iowa, Kansas, Maine, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, South Carolina, Tennessee, Utah, West Virginia.

leave of the court), and where the power to amend is restricted at every point in the proceeding. This arrangement is the single most frequently occurring arrangement (35% of all jurisdictions). The rest of the jurisdictions fall somewhere between these two extremes in various combinations of restrictions. Generally, the pattern of restrictions is in the direction of more restrictions in more serious cases.

5. The Prosecutor's Definition of His Function

The other significant factor affecting the nature of the prosecutor's screening function is the chief prosecutor's definition of his office's function in the system. In this regard out findings parallel Jacoby's (1977:15). Despite all the calls for tough prosecutorial case screening there are still a substantial number of chief prosecutors who have not yet recognized or admitted that their office has the power to refuse cases or change the level of police charges. Some may not yet have perceived the need for screening. But others are simply unwilling to assume the political risks of taking over the charging process (if they do not control it already) and being selective about admitting cases into the system.

Illustration #7.3

> In jurisdiction 5 the prosecutor's office does not screen cases out until they reach the grand jury. Even then most of the screening is done by the grand jury. We asked the first assistant prosecutor why his office had not established an early screening unit. (Such a unit could have been easily established with little cost in his jurisdiction because the county was geographically small and the courts were both located in one place.) At first he suggested that prosecutors in his state were not legally authorized to exercise such discretion. Later, after it was established that

> his offices does have such authority, he changed his argument to "the people of [this] county wouldn't stand for it."

Chief prosecutors vary in their willingness to exercise their charging discretion along a cumulative scale from almost none at all to substantial amounts. The scale consists of two different bases for exercising discretion: (a) refusing to prosecute certain categories of crimes or criminals (such as gambling or marihuana possession of less than a certain amount or refusing to prosecute certain crimes as felonies, such as commercial burglary); and (b) screening cases out on the basis of case strength using some standard of strength higher than probable cause (such as beyond a directed verdict, substantial probability of winning, or beyond reasonable doubt). Combining these two bases for screening we developed the cumulative scale described in Table 7.9.

If a prosecutor is willing to screen on the basis of case strength (beyond probable cause), he is usually also willing to screen on the basis of categoric non-prosecution of selected crimes or criminals. But, the opposite is not true. One finds prosecutors whose offices engage in categoric but not quality (case strength) screening. However it is hard to tell whether this is due to a fear of the risks involved, or philosophical disapproval of quality screening, or whether it is simply an unwillingness to devote the additional resources necessary to do quality screening. Unlike categoric screening, quality screening requires that a trial-experienced prosecutor do the screening.

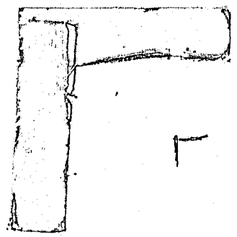

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Table 7.9

CUMULATIVE SCALE OF THE DEGREE OF DISCRETION PROSECUTORS ARE WILLING TO EXERCISE

Degree of Discretion Prosecutors Willing to Exercise	Bases for the Charging Decision
Low	Screening solely on the basis of presence or absence of probable cause
	Screening involving categoric non-posecution of selected crimes or criminals
	Screening on the basis of case strength beyond the probable cause standard
	(a) Beyond a directed verdict
	(b) Substantial probability of winning
High	(c) Beyond a reasonable doubt

To accurately estimate case strength one must know the "law in action" (i.e., what the local judges and juries will actually do in certain cases).

What explains the variation in the willingness of chief prosecutors to exercise their charging discretion is a topic worth further research. We were unable to discern any apparent explanations. However, two observations seem relevant. First, contrary to what it may appear like to the police in jurisdictions where it is happening, prosecutors who make the fullest use of their discretion are not necessarily "bleeding heart liberals" or "politicians making good track records for themselves." The prosecutor in jurisdiction 11 exercises his charging discretion to the maximum but he appears to be anything

but a bleeding heart or a politician simply motivated by trying to establish a good track record. He strongly and sincerely believes that his policy of allowing only the strongest and most serious cases into the court system allows him to successfully seek and obtain severe penalties without giving away much in plea bargaining. This, in turn, he believes allows him to achieve a more effective kind of crime control than the alternative of allowing many more cases into the system but being forced to give away more in plea bargaining and getting less severe sentences.

Secondly, it seems that as caseload pressures grow and criminal justice dollars shrink, necessity makes a virtue of previously more risky and controversial charging policies. Today's chief prosecutors are less willing to be simply lawyers for the state at trial. More of them are recognizing the practical need for someone to fill the role of criminal justice system manager; and further, they are recognizing that the prosecutor is structurally in the best position to be that person.

6. The Police Role in the Charging Stage

The charging stage is a domain divided. Although the police role in the charging stage is on the wane it has not been eliminated. The police continue to share with the prosecutor partial responsibility for the charging process. In many jurisdictions where the prosecutor does not control the initial charging decision and has a limited presence in other parts of the charging process, the police play a correspondingly larger

role. In some jurisdictions the police not only control the initial charge but also act as prosecutor at the initial appearance, the bail hearing, and the preliminary hearings in felonies. Sometimes they even act as prosecutor at the trial of misdemeanors and felonies. A national survey conducted in 1973 (Law Enforcement Assistance Administration 1978:5) found that 23 states employ "police-prosecutors" (an official of a law enforcement agency who prosecutes crime); and in 7 of the 23 states some of the responding police-prosecutors indicated that their jurisdictions cover the full range of crimes including felonies. Massachusetts has the highest number of these police-prosecutor agencies (apparently a reflection of the colonial influence of the British system--where police even today act as prosecutors). We suspect that the national survey undercounted the extent to which police serve as prosecutors in the charging stage. The report only counted as "police-prosectors" those law enforcement officials who are formally designated as such. In our observations the police frequently serve as prosecutors even though they do not bear the formal designation, "police-prosecutor." In one jurisdiction the prosecutor's office was frequently not present at the initial appearance or preliminary hearing of felonies or trials of misdemeanors (apparently because of a shortage of staff). In these cases the police presented the state's case as if they were prosecutors. The drawbacks of these arrangements were apparent. The police did not have a sufficient impartiality about the case nor the legal expertise to properly respond to them, as indicated by the following field notes.

Illustration #7.4

We observed an official police-prosecutor system at work in jurisdiction 2. In that state, an effort is being made by prosecutors to legally abolish the position of police-prosecutor. However, the Supreme Court has prevented the total abolition of the office.

In one of the three districts courts in jurisdiction 2, the presiding judge got rid of the police-prosecutor by refusing to allow him to prosecute. According to an assistant prosecutor, the judge did this primarily to get some neutrality on the part of the prosecutor in his court and because there was absolutely no screening occurring. "The police could get anything they wanted." The police prosecutor has the authority to reject cases but "won't because he's too close to his fellow cops." However, the assistant prosecutor who has been assigned to the district court does not screen cases either because he does not have the time. Therefore, no real screening occurs either at the initial appearance or at the preliminary hearing. An assistant prosecutor reported, "Nothing washes out. If there's a weak case presented neither the police nor the sitting judge will drop it out. Rather the judge will say, 'There's a lot of evidence here but I think the grand jury should take a look at it.'"

The police-prosecutor had no legal training beyond what he learned on the job during the 9 months in which he had served. He was a member of one of the several local police departments but he handled the cases from all the departments. His responsibility included prosecuting felonies and misdemeanors through the charging stage of the process. This often included plea bargaining with defendants and handling misdemeanor trials. We observed him at work in one trial for drunk driving. The first witness was one of the arresting officers. The police-prosecutor demonstrated a basic understanding of the prosecutor's job. He asked a series of questions to establish the officer's identity and the circumstances of the arrest. This was made somewhat easy for him because the officer on the witness stand had obviously been through the routine several times before and frequently responded at length without needing additional probes. However, the limits of the police-prosecutor's legal and prosecutorial skills readily became apparent when the defense attorney cross-examined the police witnesses and directly examined the testimony of the defendant. At one point in the cross-examination of the arresting officer the defense counsel asked him: "Did he (the defendant) understand that you wanted his license?" At that, the judge interrupted the defense counsel saying

"You cannot ask that of the police officer." Later, after the defendant had taken the witness stand and been examined by the defense counsel the judge interrupted counsel again stating, "We have a police officer (referring to the police-prosecutor) who is not a lawyer. I've allowed you to lead him (the defendant) all over the place; but I won't allow this last question."

Even in jurisdictions where the prosecutor is formally in control of the charging process, several writers have pointed out and our findings confirm that the police may still have a major, albeit, unofficial role in the process. Coleman (1972), a police lieutenant from Okland, California, reports that

> "Due primarily to the close personal relationship between the prosecutor and the police investigator, a remarkable transfer of authority has occurred in many prosecutors' offices. Some of the powers traditionally vested in the role of the prosecutor have been 'loaned' to the police detectives; namely, the prosecutor has voluntarily transferred a portion of his discretionary authority to the police detective for use in facilitating crime investigations . . . . [T]he criminal investigator is consequently the prime determinor of whether or not to charge a suspected offender, what charges are to be filed, as well as an active participant in the plea bargaining process.
>
> ". . . [A]s the detectives learns the operating standards of the deputy and the prosecutor learns to trust the judgment of the investigator, a pre-arranged agreement is founded that allows the detective to work virtually uninhibited with the prosecutor's discretionary authority. This authority is given informally, on an individual basis. Some detectives, because of their inability to use sound judgment or other personality factors, will never receive the privilege of prosecution authority transfer."

A similar finding was reported by Littrell (1974:232) based on his observations in one jurisdiction in New Jersey. He concluded:

> The detective bureau of a modern police department can be conceived of as a specialized criminal law office that performs major legal functions . . . . Detective bureaus are increasingly concerned with 'law finding'

> . . . rather than with arrests--the maintenance of public order . . . The boundary-spanning role played by detective bureaus gives local police departments a considerable amount of control over the prosecutor's office and over the charging process . . . Detectives have much control over information and, therefore, . . . detectives have important control over the charging process . . . . [T]he 'quasi-magisterial' role of legal evaluation falls increasingly upon detective bureaus of local police departments.
>
> Although many prosecutors would protest this conclusion, arguing that they do review cases, the writer's observations overwhelmingly support the conclusion that prosecutors review police work with an eye to trouble . . . but a case that has been 'made' is rarely reopened [by the prosecutor].
>
> . . . [P]rosecutors exercise limited amounts of explicit control over the police in the charging process. [Prosecutors] do not often appear to directly alter police charging decisions. An important finding of the study, then, is that the law-finding function was done primarily by the police rather than by prosecutors.

Yet another study reported similar findings. In observations of the initial charging process in Los Angeles, California, Graham and Letwin (1971:644) found:

> "Quite often where the police have decided that they do not have a case, the officer will simply hand the papers to the complaint deputy with the comment, 'This one is a "reject".' This is tantamount to a request that no complaint issue. In such cases, most complaint deputies will not bother to read the reports but simply process the cases as if it had been declined on the basis of prosecutorial judgment. Estimates of how many 'rejects' are presented to the complaint deputy tended to vary, with some informants claiming that the vast bulk of the cases in which no complaint was issued are the result of police rather than prosecutorial screening. Most were in agreement, however, that gross statistics about the number of cases in which a felony complaint was refused by the District Attorney's office tend to give a misleading impression of the extent of prosecutorial screening because the statistics fail to recognize the phenomenon of the police requested reject."

We also found that in some jurisdictions the police played an informal but significant role in the charging process, as illustrated below.

Illustration #7.5

In jurisdiction 15 the prosecutor's initial case screening unit was staffed by two retired police detectives who operated under the direction of a senior trial attorney. The prosecutor explained that this arrangement was necessary because he could not persuade any of his prosecutors to work in the screening unit.

Illustration #7.6

In other jurisdictions the police have established within their department strong internal case review procedures which anticipate the charging decisions of the prosecutor. In jurisdiction 3 the police have their own liaison unit which consists of attorneys who review cases and in a substantial proportion of them send them back for further investigation before the case is delivered to the prosecutor. In jurisdiction 7 in one police precinct a special project has been established to enhance the quality of the arrest report forwarded to the prosecutor's office. This project includes recommending that the case be dismissed in appropriate cases.

These findings together with those reported in the literature suggest that there are two converging trends in police and prosecution work both affecting the charging process. In police departments large enough to afford it, increased professionalization has meant developing mechanisms for case review prior to referral to the prosecutor's office. To some extent this trend involves a form of pre-screening and represents police participation in the charging process. At the same time there is a trend toward the continued expansion of the prosecutor's role in the charging stage of the process.

7. Conflict Over Charging Decisions

The charging decision is one of the major sources of complaints police have against prosecutors and, indirectly, of complaints prosecutors have about the police. Moreover, the charging decision has been the target of critics of plea bargaining. The latter complain that both police and prosecutors "overcharge" cases for purposes of plea bargaining (Alschuler, 1968; Chambliss and Seidman, 1971; Klein, 1976). The analysis below attempts to identify the precise nature of these complaints; the reality that lies behind them; and the feasibility and desirability of altering that reality.

The police complaint about charging decisions is not a unitary one. It covers a variety of things related to charging including the charging rates; specific individual cases; categoric exclusions of certain cases from prosecution; complaints that the standards are too conservative or that they are unevenly applied; and complaints about the unpleasant interaction with prosecutors at charging.[47] Sometimes it appeared that that police regard every case rejected at charging as a personal criticism of their work. In a panel discussion with the eight top commanding officers of one mid-Atlantic police department, for example, we explored whether these officers understood why cases drop out of the system. We had taken it for granted that experienced police officers (at least, commanding officers) must be aware of the many reasons why cases fall apart and that

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47 See Chapter 2, Table 2.2.

frequently this happens because of things beyond the control of the police. We had assumed that when such cases are dropped or plea negotiated the police would not take this to mean the prosecutor was necessarily criticizing the police work in these cases. We also expected that the police would be willing to admit that some of the cases they referred for prosecution were not very strong. Thus, we were surprised when this panel displayed so little knowledge of these matters and took the position that 100% of the cases they brought to the prosecutor could go to trial and would have a reasonably good chance of conviction. For them, every case rejected was interpreted as a criticism of their work. Clearly such a view is unrealistic and to the extent that police share it there will be unnecessary and undesirable friction between them and prosecutors.

To determine how common this view is we pursued the matter in three ways: the telephone survey to the national sample of police departments; special surveys of gatherings of police and prosecutors at national meetings; and additional inquiries in the 16 jurisdictions visited in the field. The results of these three different inquiries indicate that the majority of police recognize the legitimacy of some amount of case rejection. But, the rate of rejection that they regard as reasonable is considerably below the rate which probably is necessary and appropriate. Also, their understanding of the causes of charge rejection and charge reduction is inadequate and somewhat self-deceptive.

The telephone survey found that 13 of the 17 police depart-

ments responding felt that the case rejection rates in their jurisdictions were "about right." However, the rates they reported were very low. (None was over 10% and half were 5% or less.) With such low rates it is not surprising the police felt they were "about right."

We asked the police chiefs attending the FBI Training Academy to estimate the rate at which their departments' cases are rejected by prosecutors and to indicate how many of those rejected cases should have been accepted. We also asked for their perceptions of the reasons why prosecutors reject cases. One of the 11 chiefs took the position that "most" should have been accepted see Table 7.10; another four felt that as much as 40% or more should have been. Thus, five of the eleven chiefs believe that a substantial portion of their cases now being rejected should be accepted by the prosecutor. They feel this way even though the estimated rejection rates for their cases is 30% or less. This 30% rejection rate (while higher than the 10% rate reported in our telephone survey) is still not what might be considered high. If anything it may mean that the prosecutor is not rejecting enough rather than rejecting too much. In other jurisdictions the rejection rate is substantially higher. In jurisdiction 13, the police estimate they, themselves, release after arrest 55% of the armed robberies. In jurisdiction 11, the prosecutor rejects 65% of the armed robberies. In 1967 in Los Angeles 20,615 felony arrestees were released (Graham and Letwin, 1971:643). In 1978 for the entire state of California, 25.7% of the total number of arrests were released either by the police on

their own authority or by the prosecutor refusing to charge the case (California Department of Justice, 1979:4). In jurisdiction 7, where the police report they make 22,500 felony arrests the prosecutor indicts only 2,500 felonies. He insists that "that is all the felonies that occur here." In Chicago in 1972, the prosecutor's Felony Review Unit declined to obtain indictments (i.e., concluded that "crimes had not actually been committed") in 41% of the murder cases brought by the police, in 95% of the armed robberies, in 87% of the rapes, and in 97% of the aggravated batteries (McIntyre and Nimmer, 1973:20). In Philadelphia in 1973, an experimental early prosecutorial review project found that 41% of the 20,000 arrests could be quickly eliminated from the system if the project had continued (Savitz, 1975:262).

With regard to understanding the reasons for case attrition the police chiefs attending the FBI Training Academy displayed a greater understanding and willingness to accept some attrition than was apparent among the panel of officers from our mid-Atlantic city. Six of the eleven chiefs that gave relevant responses recognized that case strength is an important factor; and four of the 15 chiefs who commented at all said they had no problem with the rejection rates. However, also noticeable in the responses of these chiefs is some patent cynicism about the prosecutor's motives (for example, the responses, "Not 100% sure of conviction;" "Not worthy of the work he would have to prove a case successfully;" and "Desire to enhance prosecution record"). Also noticeable is a lack of an accurate feel for the causes of

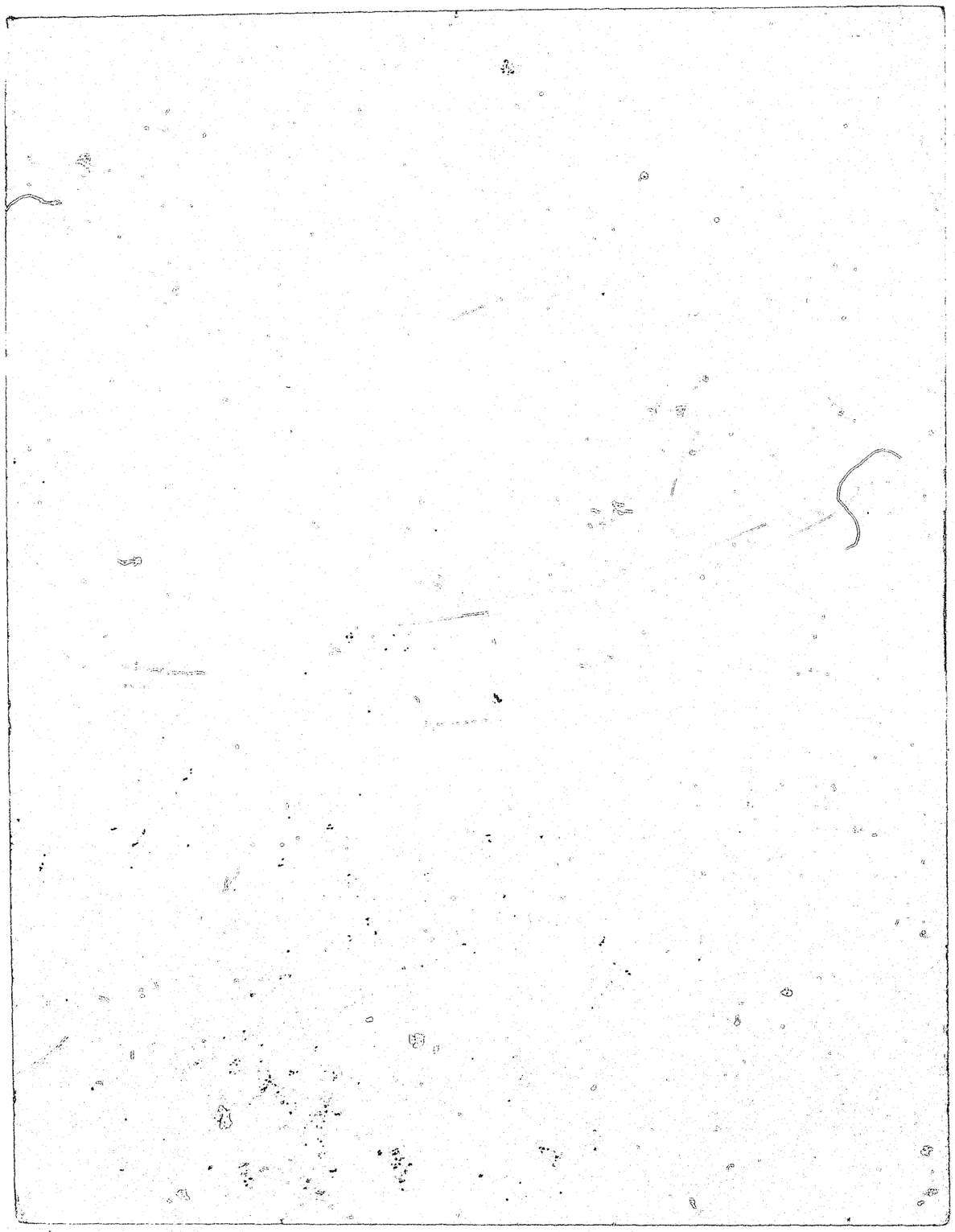
Table 7.10

POLICE CHIEFS' ESTIMATES OF RATES OF PROSECUTORIAL REJECTION OF THEIR DEPARTMENTS' CASES, THE APPROPRIATENESS OF THE REJECTION RATE, AND THE PERCEIVED REASONS FOR REJECTIONS*

Police Department	Estimated Rejection Rate for this Department	Estimate of how many of the rejected cases should have been accepted	Perceived Reasons for Case Rejection [Verbatim responses to the question: "If the prosecutor rejects more cases than you think he should, why (in your personal opinion) does he reject so many cases?"]
A.	30% of felonies 20% of misd.	"at least 50%"	His opinion that court will find not guilty based on past court practices.
B.	15-25%	"most"	Not 100% sure of conviction. Caseload. Prosecutor's priorities Crowded jails.
C.	15%	33%	Assessment of probability of conviction. Caseload management.
D.	10%	No estimate	Caseload dockets. Desire to enhance prosecution record.
E.	10-20%	No estimate	No plea bargaining policy. Charging standards not bad, application often unrealistic.
F.	5%	20-40%	No comment.
G.	10%	10-50%	Evidence and arrest considerations--doubt that he can win the case.
H.	10-15%	33%	Present rejection policies are not unreasonable.
I.	1-10%	20-30%	Elements are not present.

Police Department	Estimated Rejection Rate for this Department	Estimate of how many of the rejected cases should have been accepted	Perceived Reasons for Case Rejection [Verbatim responses to the question: "If the prosecutor rejects more cases than you think he should, why (in your personal opinion) does he reject so many cases?"]
J.	10%	"very few"	I do not!
K.	50%	20%	Not worthy of the work he would have to prove a case successfully.
L.	30%	40%	Workload, available staff. However, we have obtained a new prosecutor . . . and considerable improvement is expected.
M.	5-10%	None	No problem with rejection rate.
N.	No estimate	No estimate	Generally I feel that if the proofs are there most prosecutors will try the case. Cases are usually rejected because of poor case.

* Jurisdictions in this sample (arrangement no in the same order as responses): Birmingham, AL.; Alameda Co., CA.; Long Beach, CA.; Los Angeles, CA.; Sacramento, CA.; Washington, D.C.; Fort Lauderdale, FL.; State of Michigan; St. Louis, MO.; Tulsa Ok.; Austin, TX.; Houston, TX.; Canada, Vancouver, B.C.



case attrition as well as an tendency to resort to an explanation that may become the new myth in the verities of police work. The explanation that the prosecutor screens out cases as a "caseload management" technique is a form of subtle self-deception. It implies that but for the lack of resources all (or most) of the cases brought by the police would go to trial. This masks an unrealistic and long-outdated ideal that every case should be disposed of by a jury trial no matter how strong the evidence is. It also can easily become a rationale for not developing a conviction-orientation among the police and for not examining the quality of the arrests being made. It prevents the police (as well as others) from coming to gripes with the point that many of these cases are not "real" cases to begin with and no amount of additional resources would change the prosecutor's decisions in those cases. This point was repeatedly made by prosecutors in the field and has been documented by other studies, as illustrated below.

Illustration #7.7

> The evaluation of the experimental early prosecutorial review of arrests in Philadelphia ran a check on the discretion exercised by the prosecutors who rejected cases (Savitz, 1975). Full D.A. records were reconstructed on a sample of cases which had been reviewed, half had been accepted and half rejected. These files were then submitted (without indication of their final disposition) to an expert trial lawyer who remade the decisions. In 44 of 45 cases the expert agreed that the original prosecutor had made the correct legal decision. In 33 of 45 cases he made the identical decision as the original prosecutor. In 7 others he would have rejected (not for legal but for police reasons) cases where the prosecutor had accepted them; and in 5 others he would have accepted where the prosecutor rejected.

Illustration #7.8

> In jurisdiction 7, the police were upset at the vast discrepancy between their felony arrest rate (22,500) and the prosecutor's indictment rate (2,500). They believed that the prosecutor was artificially holding down the case acceptance rate. We asked the prosecutor if this were so. He unequivocally denied it and argued that the police were so arrest-statistics-conscious that they "bring in anything they get" and they "overcharge" everything.

In 1926, the Missouri Crime Survey (Missouri Association of the Criminal Justice, 1926:156) reported that the major reasons for case dismissal (overall dismissal, not just at initial screening) were: (a) "lack of cooperation of arresting officials in procuring the evidence." (b) "lack of assistance which would enable the prosecutor to interview witnesses while the evidence is fresh and prevent absence of witnesses;" and (c) "lack of library and other facilities necessary to prepare cases on the law." Fifty years later Brosi (1979) provided a more comprehensive analysis of the reasons for case attrition at initial screening (and other stages of the process) based on PROMIS data from five jurisdictions.[48] The rate of attrition at initial charging among these jurisdictions in 1977 varied from a low of 18% in Cobb County to a high of 48% in New Orleans. The two broad categories of reasons accounting for most of the attrition was "evidence problems" (from 17% to 56% of rejected cases) and "witness problems" (from 6% to 63%). Only a small proportion of cases were rejected for "due process problems" (from 2% to 9%); and a somewhat larger percent were rejected because the

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[48] Cobb County, Georgia; the District of Columbia; Salt Lake, Utah; New Orleans, Louisiana; and Los Angeles, California.

prosecutor decided they did not "merit prosecution" (3% to 22%).

These data shed some new light on the charging process but do not resolve all the questions of concern to police and prosecutors. The study indicates one major part of the problem at charging is something neither the police nor the prosecutors can clearly be blamed for, namely, witness non-cooperation.[49] Another possible part of the problem, namely, police making illegal arrests or searches or failing to notify defendants or their rights, is <u>not</u> a major cause of <u>initial</u> case drop-out. Thirdly, prosecutors do drop out a small but substantial proportion of cases not because of a lack of evidence but because of the sense of justice calls for it.

The Brosi study, however, leaves unanswered the crucial question of the precise extent to which poor or legally problematic police work causes prosecutors to drop cases. The reason codes used in the PROMIS data base were not designed to answer this question. For example, the category "evidence problems" might seem on its face to be a direct measure of the quality of police work. But it is not. Some "evidence problems" are due to things beyond the control of the police (for example, the stolen goods may not have been found on the suspect but a

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[49] However some part of the witness non-cooperation problem may be attributable to the police or the prosecutor. Either official might discourage a prospective witness either intentionally or not by what they say or do in interacting with the witness. Also, some part of the non-cooperation problem is due to logistical or administrative errors made by the police and the prosecutors (such as, not recording the witnesses name and address correctly on the arrest report) (see Cannavale and Falcon, 1976).

block away). Even if it were possible to exclude from the category of "evidence problem" all cases in which there was nothing more police could have done to improve case strength, the balance of the dropped cases could not automatically be taken as a measure of problemmatic police work. Some portion of them may have resulted from a discrepancy between the standard of evidentiary proof used by the police for arrest and the standard used by the prosecutor for case acceptance. The police may have been arresting on probable cause while the prosecutor was accepting for prosecution only cases with a higher probability of conviction. Thus, the cases which fall out of the system through this gap can not be attributed to police work.[50]

The only published effort to directly measure the degree to which the quality of police work is directly responsible for case drop out at charging is the evaluation of the Dallas (Texas) Police Legal Liaison Project (National Institute of Law Enforcement and Criminal Justice, 1978:9). That project provided the Dallas Police Department with assistant city attorneys who reviewed all police reports for legal sufficiency before they

50 Unless one assumes that the police must adopt for their arrest standard what the prosecutor adopts for his case acceptance standard. Such an assumption, if applied across the board to all crimes, would seem to place an unreasonable barrier on effective police work. However, if applied to selected or controversial crimes as a rationale for reducing the number of arrests of those crimes, then it might be a tenable position. These kinds of police issues, however, need to be more fully considered. At the moment they are not even recognized. Instead these cases falling through the gap are a continuing source of misunderstanding and antagonism among police and prosecutors.

were submitted to the district attorney's office. The evaluation found that the project reduced the number of "no-bills" due to the police error from 13.8% to 4.3% and also reduced the felony dismissals resulting from police error from 6.4% to 2.6% over a two-year period.[51]

In attempting to measure the extent to which case attrition is due to faulty police work we asked prosecutors attending the mid-winter meeting of the National District Attorneys Association to estimate the rate of rejection at initial screening in their jurisdictions and to indicate the extent to which those rejections were due to police error. Four of the seven usable responses estimated that 50% or more of the attrition was due to police error (see Table 7.11). A fifth response noted that 50% of the time police officers seek the wrong charges or charges which are too serious. The prosecutors in the 16 jurisdictions we visited also reported that a major reason for case rejection or charge reduction at initial charging is problemmatic police work. This usually took certain common forms: (a) the case either lacked probable cause or was very weak; (b) there was or might have been sufficient probable cause for arrest but the police failed to prepare the case in a way that either established probable cause or failed to make it strong enough to

51 In Dallas County, the bulk of the formal charging decisions are made by the Grand Jury. Unfortunately the project's methodology for determining when a no-bill or dismissal was due to "police error" was not explained. Some people familiar with the project believe it was based on judgments made by police officers working on the project.

Table 7.11

PROSECUTORS' ESTIMATES OF THE RATES THEIR OFFICES REJECT AT INITIAL SCREENING CASES BROUGHT BY THE POLICE AND THE DEGREE TO WHICH POLICE ERROR IS RESPONSIBLE FOR THE REJECTION

Jurisdiction	Estimated Rejection Rate	Of cases rejected, percent due to: Police error (bad search, sloppy investigation, incomplete interview, etc.	Factors over which police have little or no control	Other
A.	80%	25%	25%	50% police officers seeking the wrong charge or a too serious charge
B.	5%	50%	50%	
C.	15%	65%	35%	
D.	10%	5%	95%	
E.	45%	50%	40%	10% jury appeal--more appropriate as a misdemeanor prosecution
F.	10%	100%		
G.	30%	15-20%	80-35%	

Jurisdictions represented in this sample (not arranged in the same order as responses): Phonix, AZ.; Adams Co., CO.; Madison, Co., IL.; Francisville, LA.; Clearwater, Co., MN.; Clovis, NM.; Shelby Co., OH.

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G.	30%	15-20%	80-35%	

Jurisdictions represented in this sample (not arranged in the same order as responses): Phonix, AZ.; Adams Co., CO.; Madison, Co., IL.; Francisville, LA.; Clearwater, Co., MN.; Clovis, NM.; Shelby Co., OH.

meet the beyond a reasonable doubt standard; (c) the case was a "garbage" case which the police should not have brought into the system and probably only did so to get a felony arrest statistic; and (d) the police "overcharged" the case.

In order to identify the differing bases for the complaints by police and prosecutors about each other at charging it is helpful to sort them out as has been done with the hypothetical set of data presented in Figure 7.2. This figure is not drawn to any scale. Rather, it is intended soley to illustrate the distinct bases for disagreement between police and prosecutors regarding charging. Category A in the figure refers to those arrests that were dropped by the prosecutor because they lacked probable cause. There are no estimates of how often these cases occur but they do occur and can cause conflict. It seems that the police can accept the rejection of a case where there truly was no probable cause. However, conflict arises over the fact that the probable cause standard is not a clear and certain standard but rather a judgment call over which reasonable people can differ. Some prosecutors use what they refer to as "liberal probable cause" to please the police in individual cases. In jurisdictions where the police "shop for prosecutors" it is fair to assume that there are differing probable cause standards depending upon the prosecutor involved. The danger in allowing for such differences is that it encourages police cynicism about prosecutors and feeds into the police belief that "if they really wanted to" they could accept a case.

The second category of arrests, "B", those not intended for

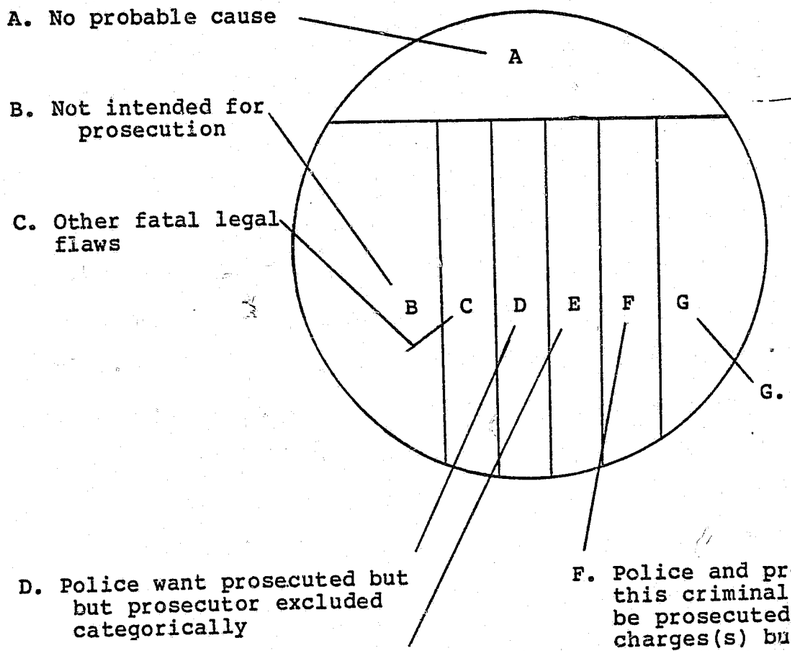
prosecution, are a major problem for police and prosecutors. The police need to arrest in certain circumstances even though they know the arrest will not be prosecuted or even though they themselves do not want it prosecuted. Some of these cases arise out of the order maintenance function of the police where they have made arrests to solve conflicts on the street. Conflict over these cases is often due to misunderstandings on both sides about how these cases should be handled. The unaware prosecutor sees them as "garbage cases" and berates the police for bringing them in (Stanko, 1979). The unaware police officer thinking that since he had probable cause and brought the case in is frustrated and angered by the prosecutor's unwillingness to proceed.

A greater understanding of each other's role would mitigate some of this conflict but not of all it because of there is an underlying philosophical and policy issue here which had yet to be fully addressed or settled. The problem is whether the police should arrest in cases where they know (with a reasonable or absolute certainty) that the case will not be prosecuted. The concern is that allowing the police to do this may be tantamount to legalizing police harassment. One has to ask whether our pluralistic society, in effect, requires a police policy of "harassment" when it simultaneously refuses to seriously prosecute certain offenses (such as vice) but also demands that the justice system (especially the police) control them? If such a policy is to be tolerated, how does one distinguish between good faith police arrests for control purposes (e.g., those done to control vice offenses) from improper arrests for harassment?

Figure 7.2

SOURCES OF CONFLICT BETWEEN POLICE AND PROSECUTORS OVER THE CHARGING DECISION

All Arrests Referred for Prosecution by Police
(Hypothetical Data)



While legal scholars ponder these issues and have yet to provide much guidance, police and prosecutors struggle with them daily.[52] This matter of arrests not intended for prosecution needs to be more fully examined by legal scholars for its policy implications. The disagreements that divide legal commentators on this issue lie behind hundreds of antagonistic exchanges between police and prosecutors across the country.

Returning to Figure 7.2, the cases in the category "other fatal legal flaws ("C") are not a major source of conflict for police and prosecutors. These are matters where the law is clear (such as lack of geographic jurisdiction) and no judgment call by the prosecutor is involved. Therefore, both sides can accept the outcome. The cases in category E, on the other hand, are a major problem. These are one where the police have either inaccurately charged or "overcharged"[53] or correctly charged but the prosecutor routinely reduces them to fewer or lower charges. The conflict here arises from several sources: police ignorance of the law; police desires for felony arrest statistics; police attempts to placate victims and the public; police differences

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52 Our own inclination was to recommend that prosecutors recognize the legitimacy of some arrests not intended for prosecution and to reject them without rancor. However, even our own Advisory Board was split on this issue.

53 The term "overcharging" is used widely in the literature but has never been clearly or unambigously defined. We shall not attempt a full clarification of the term here but would correct one of its misleading connotations. "Overcharging" does not mean illegal charging or deliberately charging beyond what the evidence might support. Rather than referring to this as "overcharging" it would be less misleading to call it "maximum charging."

with the prosecutor over the relative importance of prosecuting certain crimes at higher levels; police demand for prosecutorial support of their authority and safety on the street; and police attempts to help the prosecutor in plea bargaining. One of the main reasons for inaccurate charging and "overcharging" by the police (and a reason why Alschuler's [1968] suggestion that police should charge at the level to which a defendant would eventually plead guilty is not feasible) is that the police do not have the necessary legal knowledge and experience. They do not have the precise technical knowledge of the law to allow them to choose the correct number, kind or level of charges; and they are unaware of local court practices and the difficulty of proving certain types of charges or the "going rate" in plea bargaining for various offenses. In jurisdiction after jurisdiction, prosecutors and the police, themselves, pointed out that the police lack of this special technical knowledge.

Illustration #7.9

> The first assistant prosecutor in jurisdiction 15 reported that they had an exceptionally high rate of rejection of cases of possession of stolen property. This is because the police did not understand the legal requirements of that crime. Mere possession of stolen property did not allow them to infer that the person possessing it knew the property was in fact stolen. The law requires that the state be able to prove that the person had knowledge that it was stolen. The police, however, did not appreciate the import of this requirement and made free use of the possession of stolen property statute to arrest anyone who appeared to have property that was stolen. That is, they would arrest people who had property that was incongruous with their dress and demeanor, such as "Joe, the Rag Man, carrying a $500 guitar." They knew the hobo carrying the expensive guitar did not own it and tried to prosecute him for it. Or, if they saw a person who they knew to be a thief in possession of something of value, they would arrest and try to get it prosecuted.

This misunderstanding was eventually cleared up by the prosecutor who gave training lectures on it at the police station.

Sometimes the police officer knows the law in general but may not appreciate the difficulty of proving the case at trial. This appears to be what lay behind the complaints of an arson investigator with 15 years experience in jurisdiction 1.

Illustration #7.10

> He said that on some occasions he had to "fight with the prosecutor to get the right charge in the case." For instance, the investigator may think the case is second degree arson (setting fire to an occupied dwelling without knowledge that there are people inside) whereas the prosecutor thinks the case is third degree arson (setting fire to an unoccupied dwelling). The argument with the prosecutor is over the provability of the case. The second degree arson is described as one where the building is occupied and the defendant has a "reasonable belief" that the building is occupied. The investigator reported that on some occasions the defendants have said to him, "Yeah. I knew they were home, but I set fire to the house anyway." But the prosecutors wanted to charge third degree arson because they did not think there was a "reasonable belief" on the part of the defendant that the people were home. "So," the investigator concluded, "when you get a bad actor and the D.A. says it's third degree arson you have to fight. The investigator has a street interpretation of the crime where the lawyer reads it differently. A young D.A. doesn't 'interpret it' the say way. Occasionally you get personality conflicts. The lawyer says 'I know the law.' The investigator says, 'I've got a case.'"

The police lack of technical knowledge of the law is compounded in some places by a lack of other essential supports such as copies of the criminal code and departmental policy guidance.

Illustration #7.11

> In jurisdiction 5, the deputy police chief reported that his department only has two copies of the criminal code for the state and they are only available when the legal counsel's office is open, 8-5 weekdays. He and

> some other officers have purchased their own copies of the criminal code for $26.00 at their own expense. He said the local prosecutor had instructed the police in training bulletins not to "pyramid" charges. However, the number and kind of charges lodged by the police in their initial complaints depended largely on the individual officer. There was no departmental policy. He personally places the highest possible charge. He noted that many detectives will charge crimes that do not even exist in his jurisdiction such as "strong arm robbery" and "breaking and entering."

Sometimes the police are correct about whether the crime committed meets the technical legal definition of the charge they want but the prosecutor chooses not to file that charge. The typical example of this is where the police want the case "overcharged" and the prosecutor refuses to go along.[54] This is a common source of tension between police and prosecutors because the police have several reasons for wanting to charge high and the prosecutor has reasons for wanting to charge low, or, at least more accurately. The police want to charge high to get the felony arrest statistic.

Illustration #7.12

> The chief of police of the major police department in jurisdiction 1 put it this way. "You can't stop a young cop. If the elements of a crime are there he's going to arrest and charge the maximum charge. If the description of the crime fits the statutory description of a felony, he is going to charge a felony. If the prosecutor did the charging the crime rates would be reduced drastically because the prosecutor would charge not solely on whether the elements of the crime were there but on other factors. It's human nature for cops

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54 In his observations of the initial charging process in Alameda County, California, Sklonick (1966:199) observed 48 attempts by police officers to influence the deputy district attorney's decision one way or another. In forty the police argued for a more serious charge and in eight for a lighter one. The deputy went along with the police in slightly more than one-quarter of the cases.

> of raise the charges to the maximum level. A cop would rather say he made a robbery (even though it was an old lady who had her purse snatched) than a petty larceny."

The police also overcharge as a way of placating or impressing victims or the public. For instance, one prosecutor complained that "the police love to charge 'assault with intent to commit murder'" because of its public relations value. The police apparently believe it impresses the victims with how serious the police regard the matter. But this causes unnecessary complications for the prosecutor. It is far more difficult to prove than a mere "aggravated assault" charge because it requires proving the defendant's state of mind. Moreover, for all the extra work it is unlikely to result in any difference in sentence.

Two crimes in particular are ones which prosecutors in several jurisdictions mentioned were often the focus of "overcharging" disagreements with the police. One is "assault on a police officer" (APO); the other is burglary. Typically the APO charge arose out of a scuffle between the officer and the defendant incident to arrest for another charge. The police officer would request the charge be added to the basic charges as a vindication of their authority. However, prosecutors tend to be leery of such charges because of the common suspicion that the schuffle might have been provoked by the officer (or, at least, avoided) and that the charges are being used vindictively. Some prosecutors' officers have policies prohibiting the filing of such charges unless the police officer sustained injuries requiring medical attention. The refusal of prosecutors to press

such charges is often interpreted by the police as a lack of support. They will say the prosecutor is sending a message to criminals that they can beat up on police officers with impunity. On the other hand, the prosecutors will say they are sending a message to the police to start developing better ways of handling situations where they might get hurt.

One common complaint by prosecutors about police overcharging was in connection with in "burglary" cases. In jurisdiction 1, the prosecutor complained that police wanted to charge burglary in cases where they found kids pulling plywood off a window of a boarded-up house which they were trying to enter to get drunk and fool around. In jurisdiction 7, the complaint was the police wanted to call petty thefts from cars or trucks "burglaries" (technically possible under the law). In jurisdiction 6, the complaint was that the police wanted to call a trespass a burglary. But burglary requires proof of intent to commit a crime once illegally inside the premises. One common situation in which this difference between police and prosecutors occurred was teenagers breaking into the local high school. The prosecutor believes that 90% of the time such break-ins were <u>not</u> done to commit felonies inside; yet, the police wanted to charge burglary.

Some disputes between police and prosecutors over the level of the charges to be filed involve differences in what the two agencies see as the more important product of the justice process. In one busy jurisdiction, for instance, the prosecutor systematically reduced all grand larcenies of commercial estab-

lishments to misdemeanors. He justified this on the grounds that he was getting the same sentences for these cases as misdemeanors as he was getting when they were felonies plus he was relieving the felony docket. The police department, however, was upset because the police did not like telling local businesses that their burglaries were being treated as misdemeanors.

Some overcharging by the police is done deliberately for the purpose of helping the prosecutor by giving them something to trade away in plea negotiations. But, it is doubtful that this is a major factor in motivating the police in their charging decisions in most cases. In some places police "overcharging" is actually encouraged by the prosecutor on an across the board basis or for selected crimes. This is to get around various legal obstacles. In one jurisdiction where the law precludes juries from finding lesser included offenses which are not specifically charged and where amending the initial charges filed by the police is difficult, the prosecutor's office is happy to have the police overcharge. In jurisdiction 6 where the prosecutor complained about police overcharging in burglary cases, he was grateful to have them overcharge manslaughter cases as murder cases because murder is easier to prove.

Some police officers develop a sophisticated appreciation of the law enforcement uses to which the charging decision can be put. For instance, a police detective in jurisdiction 10 reported that in murder cases his unit always charges first degree for three reasons: to protect the witnesses by increasing the likelihood that the defendant will be kept in pretrial

detention; to make the amount of bail money as high as possible in the event that he does make bail he will be less likely to abscond; and to help the prosecutor by giving him something to negotiate with in plea bargaining. He says his offices recognize that under the law of their state if they charge manslaughter there is no lesser included offense. Thus, if the manslaughter charge were lost there would be nothing left to the case so they protect against this possibility by filing the higher charge. However such sophistication does not appear to be the main reason for police overcharging. Rather it is the combination of a lack of technical expertise in the law and a desire to get the highest possible charge that explains police charging practices.

In general the police tend to make a literal reading of the statute books and to add most of the charges supported by the evidence. Some of them realize that this will be helpful in plea bargaining but they do not pile on charges solely for the sake of plea bargaining. This conclusion is fortified by the results of a hypothetical question we put to 18 police officers in 11 jurisdictions. They were asked how they would charge a case in which during the course of an armed robbery the robber ordered the victim to move from one room to the next. The question was whether or not they would add a charge of kidnapping. Sixteen of the 18 police said they would not; one said maybe; and one said he would.

Returning to Figure 7.2, the cases in category F are also a cause of conflict between police and prosecutors. These are the cases where probable cause exists and both police and prosecutors

agree that these kinds of cases should be prosecuted but the prosecutor declines them because of a lack of case strength. From the prosecutor's perspective many of these cases are the result of a failuure of the police to make a case as strong as it should be. From the perspective of some police, these are the cases tht the prosecutor should be willing to "take a short at." These are the ones he is "afraid to prosecute because he's too lazy to work on." These are the cases that fall in the gap between the traditional standard police used in making arrests, namely, probable cause, and the higher standard of proof that more and more prosecutors are beginning to apply to cases before accepting them. When the police begin to recognize the legitimacy of this higher standard and incorporate it to the extent possible into their own work, much of this conflict will disappear. Also, the conflict over thee cases can be reduced if the prosecutor estblishes his credibility with the police as someone above politics and committed to the enforcement of law.

8. Conflict Over Domains

A different kind of conflict between police and prosecutors at the charging stage of the process is the result of encroachments by the prosecutor on traditional police domain. In six of the 16 jurisdictions visited, the prosecutor was either in the process of taking over part of the charging domain that once belonged to the police or had recently changed the nature of his early case review from a rubberstamp of police work to a serious screening procedure. In two other jurisdictions reported on in

the literature, Chicago (see, McIntyre and Nimmer, 1973) and Alaska (see, McDonald, 1979), similar moves have been made by the prosecutor. In all eight cases resistance from the police either occurred or was anticipated. In jurisdiction 8, police resistance prompted the prosecutor to lobby the state legislature for a law which required the police to cooperate. In jurisdiction 1, police opposition to the charge has caused the prosecutor to move far slower than he would like to. At this stage, he has only inaugurated a citizen's dispute settlement screening program in order to get the police used to the idea of his office reviewing cases early in the process. The need for such a review is evident from the fact that of the 7,000 felony arrests the police introduce into the system, 5,000 of them get "adjusted" at preliminary hearing either through guilty pleas or reductions to misdemeanors for trial in the city courts. Of the remaining 2,000 cases bound over to the grand jury approximately 1,000 are returned to the lower court for disposition as misdemeanors after the prosecutor of the Grand Jury reviews them. The chief prosecutor is reluctant to inaugurate a full fledged early case screening program until he gets the police comfortable with the idea. He says he is afraid of "burning bridges."

In jurisdiction 6 the prosecutor insisted that the police clear all cases with him before filing them in court. There was some initial resistance to this but within a year the police had adjusted and did not have any complaints about it. Similarly, in Chicago, when the new Felony Review Project began in the State's Attorney's office there was some resistance from the police who

formally controlled the initial charging decision. In order to get the Chicago Police Department to accept the new arrangement the prosecutor had to agree to leave with the police commanders the power to file charges in felony cases where they disagreed with the prosecutor's decision not to file (McIntyre and Nimmer, 1973:6). However, according to executive-level officials of the State's Attorney's Office the police have adjusted to the change and infrequently exercise their option to countermand the prosecutor's decision. When they do make such countermands it is usually to appease some officer who wants the case filed rather than because of a difference in judgment of the merits of the case.

Most remarkable of all is the change of police opinion in New Orleans, Louisiana. When the prosecutor there began a tough screening policy the case rejection rate went up to 46% and the police went to the newspaper (Times-Pacayune, 1974). The police publicly complained that they refused to believe they were "wrong" in almost half of the arrests they make. However, a few years later the police had begun a program of reviewing cases before sending them to the prosecutor's office and keeping track of what they would like to see happen in those cases. Amazingly, they agreed with the actual prosecutor's disposition in approximately 90% of the cases.

These examples suggest that while the police may initially resist the trend of greater prosecutorial expansion into domain that historically belonged to them, these changes are fairly easily accommodated and should not represent major reasons for

prosecutors to forego making them.

9. Summary and Conclusions Regarding Charging

The charging stage is a domain divided. Historically it belonged to the police but is gradually being taken over by prosecutors and used as the major screening point for selective enforcement. However, the transition is far from complete. The police continue to play a significant formal and informal role in this stage and are likely to do so for the foreseeable future. In the majority of jurisdictions the police make the initial charging decision and generally do so by including the maximum number of charges based on a literal (untrained and inexperienced) reading of the law and a desire to get as many cases accepted as the felony level as possible. This creates significant costs to defendants (especially because of its impact on the bail and pretrial release decisions) and on the criminal justice system because of the high caseloads and "inflated" charges it creates. However, it is a situation that cannot feasibly be solved on many jurisdictions by either requiring that all cases be reviewed before initial filing by prosecutors or requiring that all police have the legal knowledge and experience of a prosecutor. In many jurisdictions the cost of requiring initial case review on an in-person basis by prosecutors are currently prohibitive. However telecommunication hook-ups between police and prosecutor offices and computer-assisted case evaluation technology could possibly solve some of these costs.

Where pre-initial charging case review by prosecutors is

financially feasible it can produce major savings for the court system and should be implemented. However, such a review needs to be supplemented by a second review. Minimal reviews solely for the basis of determining legal sufficiency can be done shortly after arrest and can produce major savings in terms of cases dismissed. But, if the prosecutor's review is intended to examine case strength beyond mere probable cause then a delay of from two to seven days before the review is desirable to allow follow-up investigation and a realistic appraisal of the victim's true commitment to the prosecution of the case.

Some of the conflict that occurs between police and prosecutors over charging decisions is unnecessary and undesirable. It could probably be alleviated if each group had a better appreciation of the work of the other and the necessity for selective enforcement. But not all of the conflict that occurs between these two agencies at charging is undesirable. On the contrary, it represents one of the unanticipated benefits of the American system of justice in which unlike the English system prosecutor has been interposed between the police and the prosecution of a case. Our office of public prosecutor brings two essential things to the prosecution of cases: legal expertise and emotional and (to some extent) organizational impartiality. The legal expertise is necessary to assure the accuracy of charging. The police cannot escape the pressure from victims and the public for quick and severe action. In contrast the prosecutor is considerably more removed from these pressures, although not immune from them. Thus, ordinarily he is better able than the

police to make charging and case disposition decisions that are not influenced by the heat of emotion or the pressure of personal or organizational efforts to appear efficient. The conflict that his resistance to such pressures is a healthy indicator that an important check in the system is working.

Because of his structure position in the system, (i.e., the fact that his office has one chief and spans the entire middle stages of the criminal justice process) the prosecutor is in the best position to serve as system manager and major controller of the selective enforcement process. In operating that screening process the threshold standard for case acceptance that he is increasingly required to use is substantially higher than the traditional probable cause standard used by the police. Until the police come to accept the necessity for selective enforcement and the reality of higher case acceptance standards, a certain amount of unnecessary conflict will continue to occur.

F. Negotiated Justice

1. Overview

Plea bargaining is the selective enforcement device through which convictions are obtained without going to the expense of trials. It is estimated that about 90% of felony convictions in the United States are the result of plea bargains (Miller, et. al, 1979). Yet, despite its long-standing, central role in the administration of justice, plea bargaining is a controversial process. The National Advisory Commission on Criminal Justice Standards and Goals (1973a:149) recommended that plea bargaining

be eliminated by 1978. Several jurisdictions have made efforts to try to eliminate plea bargaining (see, generally, McDonald and Cramer, 1980). And, police everywhere complain about it.

Plea bargaining is a complex topic. The discussion below will focus only on those aspects of plea bargaining which are directly relevant to the police-prosecutor relationship. It will review the police complaint about plea bargaining; the police role in plea bargaining; and the extent to which the law has been successful in controlling that aspect of plea bargaining dealing with the police-prosecutor relationship.

2. The Police Complaint About Plea Bargaining

The second major component of the widespread and often acrimonious police complaint about the disposition practices of prosecutors focuses on the use of plea bargaining to secure convictions (see Part I, Chapter 2). Other studies report similar findings. Some have speculated as to what lies behind the intense police feelings about plea bargaining. Certain points have been repeatedly focused upon: the police have a proprietary interest in cases; that they would like to have input into the decision making; that they would like to receive notice of the outcome; that they believe the wrong kind of factors influence the plea negotiations; and that the final sentences imposed through plea bargaining are more lenient than they should be. The highlights of some of these studies are presented below.

> Arcuri (1973) found with a 32% sample of all Rhode Island police officers that 40% of the police felt that they had no input into plea bargaining; 33% felt that political influences played an important role in the final plea bargaining decisions; and 60% felt that plea bargaining was "unfair to the arresting police officer"

> (in the sense that it was "disheartening" and "makes a police officer go sour"); but 82% of the officers said plea bargaining does not affect their decision to arrest. Furthermore, Arcuri reports that the strongest dissatisfaction with plea bargaining came from the officers under 40 years of age. He believes that part of the problem is that the younger officers are simply not trained in the reality of the need for plea bargaining. He recommends that this be done and furthermore that every effort be made to provide police with the dispositions of every case.
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> In his survey of police, McIntyre (1975:208) reported that "of all prosecutorial activities, the one most likely to be of interest to the police is plea negotiations . . . Many police probably feel they should have some participation in the disposition of persons they think are guilty." However, McIntyre found that 63% of the police said they do not participate in negotiations and 81% reported that they are not routinely informed by the prosecutor of the reasons why cases are disposed of by plea negotiations. However, 51% of the sample of prosecutors reported that their offices routinely notify the police of the reasons cases are negotiated.
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> In explaining police attitudes toward plea bargaining McIntyre says: "In the policeman's mind plea negotiations probably represent not so much a sell-out as an erosion of the role of the prosecutor as an advocate of law enforcement. The adversary process, in its purest sense, requires the parties of each side of the conflict to represent their viewpoints with zeal and vigor . . . Concessions, compromises, and leniency show less commitment to this conception of the duties of a law enforcement official than the police expect . . . The police have trouble comprehending the fact that adjudication is not a pure adversary process" (1975:213).
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> In its study of rape law enforcement, Battelle Memorial Institute (1977a) found that almost two-thirds of the police surveyed felt that plea bargaining either should be changed or eliminated. Most of those respondents who felt that plea bargaining was "fine the way it is" believed that it relieves congestion in the courts and helped speed the criminal justice process. Others felt it resulted in more convictions and a few mentioned that it was a way of reducing stress on rape victims. On the other hand, respondents who felt plea bargaining

should be changed or eliminated said they felt so because they believed the wrong kind of information was used in the process. They indicated that insufficient consideration was given to the circumstances of the crime and the concerned parties. Others mentioned lenient consequences for offenders and the reduced deterrent impact of the penalties. With regard to the police view as to whether the rate of plea bargaining in their jurisdiction was appropriate, 59% felt it was used more often than was appropriate; 36% felt it was used in about as many cases as it should be used; and only 5% felt it should be used more often. Battelle concluded that the primary support among the police for plea bargaining occurs in agencies serving large jurisdictions and that opposition to plea bargaining tended to be on the basis of issues related to fairness and equal treatment before the law.

* * * * * *

In his evaluation of the structured plea bargaining project in which police and victims were invited to participate in the plea negotiation process at which judges, prosecutors, defense counsel and defendants were present, Kerstetter (1979a & 1979b) also reported that police perceive themselves to have little influence in the plea negotiation process but those police who attended the conferences (compared to those in the control group) had this perception changed significantly. Furthermore, those who attended were considerably more satisfied with the case disposition outcome. Also interesting, with regard to the role of the police in plea negotiation, is Kerstetter's findings as to what happened to the nature of the negotiation process when the police were present. He reports that when the police were present the conferences were longer; there were more new topics introduced; there was a greater variety in settlement recommendations; more comments overall; and both the structure of the conference and the source of the recommendations which formed the basis for the settlement changed. That is, when the police were absent the judges and the attorneys dominated the discussion (59% of the cases); but when the police were present, some form of lay participation (either police, victim, or defendant) occurred in 77% of the conferences. The role the police played in the conference, not surprisingly, is one of information supplier. However, despite these changes in the nature of the discussions leading to the final decision, the presence of the police did not affect the rate of case settlement or the severity of the disposition.

In our analysis of this aspect of the police-prosecutor relationship we used the telephone survey, the in-field observations and questionnaires, and decision simulation with hypothetical cases. The telephone survey found that 49% of the police departments said that their staff had voiced complaints about the prosecutor's plea bargaining practices or policies. In some cases the complaints were that there were too many reduced charges, other complaints were about too lenient sentences; and others complained about too many charges dismissed or the fact that the police did not have input (see Appendix E). With regard to the matter of police input into plea bargaining, we heard numerous complaints in the field by police officers that they do not have an opportunity to have input into the plea bargaining decision. However, our telephone survey found that 45% of the police departments claimed that they regularly have input into plea bargaining decisions. Furthermore, 58% of the prosecutors' offices in the same jurisdictions reported that the police departments in their jurisdictions have input into plea bargaining.

As for notifying police officers of the outcome of negotiated cases, we heard numerous complaints in the field that such notification was not forthcoming. However, in our telephone survey 87% of the police departments said they are regularly informed when cases are dismissed, pled or go to trial (see Appendix F).

The results of our plea bargain decision simulation in which the police and prosecutors were asked whether they would plea

bargain a hypothetical case and on what terms have already been presented (see Chapter 2). That analysis suggests that the police complaint about plea bargaining is not really a request for greater severity. Rather, it is a desire to have input into the process and have their professional interest in the plea bargaining decision making be recognized by the other professional groups involved.

Like Arcuri, we found that the police attitude toward plea bargaining appeared to vary by age. Younger officers were less tolerant of plea bargaining than older police. This appears to be the result of police recruits operating under the misconception shared by the general public that our system is still a system of jury trial rather than one of selective enforcement. This misconception goes a long way in explaining the unnecessary cynicism and conflict generated by the plea bargaining process. A simple expedient for remedying this problem would be to include in the training of police recruits a realistic view of the necessity and reality of selective enforcement.

3. The Police Role in Plea Bargaining

The police play two important roles in plea bargaining. Their basic role is that of information supplier. As one prosecutor told us when we inquired about the extent to which the police have input in plea bargaining in his jurisdiction, "the best input the police can have is a solid police report." By making the case stronger or weaker the police largely determine

the necessity for plea bargaining.

Beyond this, however, in some jurisdictions the police have a more direct role in providing information or affecting the plea bargaining decision. In some jurisdictions the judge will not accept the plea bargain without assurance that the police officer involved approved the bargain. In other jurisdictions, especially in misdemeanor cases, one can observe prosecutors consulting with the arresting police officers before making final agreements in plea negotiations. In these situations the policeman has what is tantamount to veto power of the plea bargain. However, the police usually do not recognize this for what it is and still talk as if plea bargaining were exclusively controlled by prosecutors. In jurisdiction 13, the professional detectives association independently prevailed upon the judges to not accept plea bargains without checking for the police officer's input first. In three jurisdictions which are now replicating the structured plea bargaining experiment reported upon by Kerstetter (1979a & 1979b) the police have the opportunity to directly participate in the plea negotiations.

Aside from the matter of police participating in the negotiations being worked out by the prosecutor, there is another side of police participation in negotiations which has not received much attention. It is the direct negotiations for pleas and services between police officers and defendants. In many jurisdictions we visited defense counsel and prosecutors reported that by the time cases reach them the defendants have already pled guilty and often claim they have done so as the result of a

negotiation between them and the police. We pursued this with an interview sample of 15 defendants. Seven of them stated that the police had tried to bargain with them to get confessions. The enticement was usually a promise to speak to the prosecutor or put in a good word with the judge. In one instance the defendant claimed that the police had offered to "get him off" if he cooperated. In 6 cases the police reportedly made the comment, "things will go easier if you cooperate" or words to that effect. Only three of the seven defendants who reported that police attempted to bargain with them actually confessed. However, all seven actually pled guilty.

In different jurisdictions the police attitude about these kinds of negotiations varied. In some the police claimed that the prosecutor had delegated authority to them to make these kinds of negotiations. In some jurisdictions, prosecutors confirmed that they had delegated to selected police officers the authority to negotiate. Usually the police said that they did not promise specific sentences or anything that they could not deliver. The usual promise was to "put in a good word." Whether or not they actually did "put in a good word," however, was problematic. It should also be pointed out that in many cases the police do not have to actively try to negotiate with defendants. Several of the defendants said that they initiated negotiations with the police because "they knew" this was how to work the system.

The legal status of police negotiations with defendants for confessions and statements has yet to be fully settled. It seems

that if the police do make any promises they must fulfill them (Bradley v. State), 356 So. 2d 849). However the more basic question of whether or not they may offer any inducements in exchange for pleas or services is still unclear. The courts are divided on whether such offers or inducements are grounds for exclusion of the resulting confessions (Boston University Law Review, 1980:371).

Our impression was that neither the police nor the prosecutor seemed to be aware of the law that has developed on this point. In contrast to prosecutors who are sensitive to the court's requirement in Santobello v. New York, 404 U.S. 257 (1971) that prosecutors must fulfill any promises they make, the police seem to be largely unaware that they are under similar restrictions.

4. Summary

Plea bargaining is an essential aspect of the selective enforcement of law and yet it continues to be a point of controversy between police and prosecutors. Some of this controversy is unnecessary and appears to be based solely on a misconception among police of the true nature of the administration of justice today. Some of the conflict, however, is based on a legitimate concern by the police that they have information relevant to the disposition of cases that is not now being taken into account.

The police have both a direct and indirect role in plea bargaining. Their investigative efforts largely determine the

strength of the case and hence the terms of and necessity for plea bargaining. Their direct role in plea bargaining comes in the form of negotiations which they strike with defendants in many cases. This is an area in need of further control by law and by prosecutorial policy.

PART IV:

THE CORE TECHNOLOGY

CHAPTER 8, INFORMATION, JUSTICE AND THE POLICE-PROSECUTOR RELATIONSHIP

A. An Inventory of Propositions

Based on the literature and our field work, we arrived at a set of conclusions about the relationship between police and prosecutors. These propositions are presented as "findings" even though some of them are in the form of hypotheses.[55] They are as follows:

> The administration of justice consists of two core technologies (sets of activities, skills, knowledge, and related hardware organized around some purpose). One is to process people. The other is to process information and make decisions. The fundamental link between the work of the police and that of prosecutors lies in the work of the latter core technology. In order to understand many, if no most, of the problems in the police-prosecutor relationship, this communication technology must be examined. More generally, in order to understand the quality of justice administered in a jurisdiction it is essential to examine the criminal justice system as a communication system.
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> An ideal communication system is one which minimizes interference between the transmission of a signal and its reception. A major goal in designing the organization of the criminal justice system must be to achieve the maximum feasible and necessary (useful) communication because the quality of justice administered is a function of the amount, kind and fidelity of information available to decision-makers (all other things being equal).
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> In designing and operating the criminal justice system as a communications system, there are various constraints which affect the quality of the communication process. Within these constraints, however, there is ample room for varying the design and operation of the

55 As Selltiz, et al. (1976) note, in formulative/exploratory research such as the present study the "findings" are often in the form of hypotheses to be tested more rigorously in subsequent research.

> criminal justice communication process so as to achieve higher levels of fidelity of communication. In this variation lie some answers to the possibility of improving the administration of criminal justice without requiring radical or costly changes and without compromising constitutional or political principles. Some of this variation can be seen in the field because of the differences that exist in the way in which jurisdictions administer justice.
>
> While it is possible to vary the design and operation of the criminal justice communication process, each variation has its price. Something is gained and something lost. The trade-offs at stake can be highlighted by use of a "model" which combines the constraints on the criminal justice system and indicates how the core technology should be operated. That model is as follows: the best information (the maximum feasible and necessary amount and kind of trustworthy and legal information) must be transmitted to the relevant decision-maker by the quickest, least expensive, lawful route under conditions which allow for accountability and provide for continual, self-corrective learning experiences for both the information supplier and the information user.
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> The primary goal in designing effective relationship between police and prosecutors is to try to achieve the "model" described above. That is, to arrange their working relationship so that the best information is supplied to the appropriate decision-maker within the constraints described.
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> Some of the constraints on achieving the ideal communication system are not changeable. Others are subject to change but are not within the control of either the police or the prosecutor. Still others are within the power of either (or both) the police or prosecutors to improve.
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> Because of the phenomenon of fact negotiation as well as the interactive nature of information, prosecutors always need more information than the police can provide.
>
> Virtually all police and prosecutors have some understanding of themselves as information processors; but, few have an appreciation of the extent to which this represents the core of their inter-linked responsibility. Also, few appreciate the extent to which they are part of a communication system which bears directly on the quality of justice administered and which (to some extent) they are in a position to improve.

Organizing the criminal justice process to approximate the model communication system described above would improve the quality of justice administered and would reduce some of the friction between police and prosecutors, but not all of that friction.

Part IV of this report will support and explain these propositions by examining the criminal justice process within the conceptual framework of communications theory. The balance of Chapter 8 illustrates the administration of justice as a communication process and analyzes the relationship between the quality of information and the quality of justice. It also identifies the information which prosecutors need, the impact of selected items of information on the prosecutors' decisions, and the significance of the adversary context for the interpretation of information. Chapter 9 examines the breakdowns in the communication process that occur in the transmission stage of that process. Chapter 10 examines breakdowns in the discovery and information gathering stage of the process.

B. Communications Theory

1. Criminal Justice as a Communication Process

The process of detecting, apprehending, prosecuting and adjudicating criminals is a process of communication.[56] It begins

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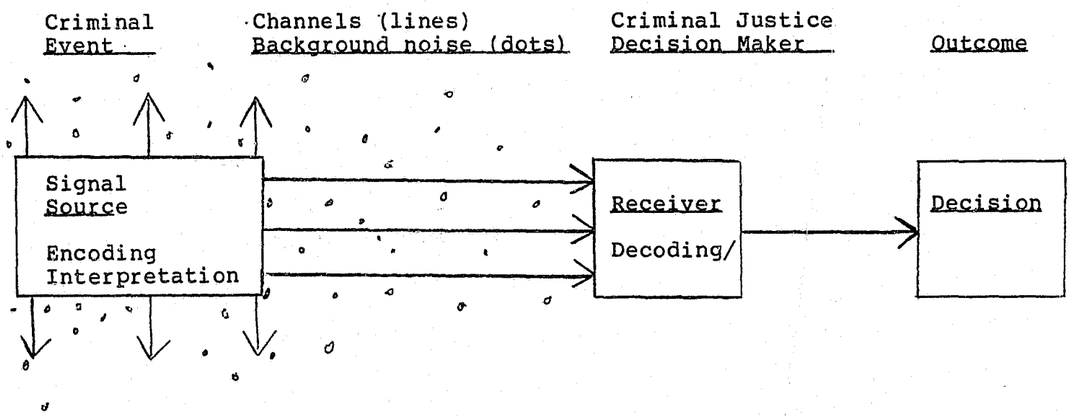
56 In conventional terms the job of obtaining and supplying prosecutors, judges, and jurors with information about a crime is referred to as the "investigative process." However, that process has traditionally been conceived rather narrowly. Books on the subject generally are restricted to discussions of the tasks involved in discovering and analyzing physical evidence and in the interrogation of
(Footnote continued)

with a suspicious and possibly criminal event and ends with a decision regarding how a case shall be disposed. In communications terms the suspicious event is a signal emitter which represents a potential source of information. Before those signals can become the basis for action, they must be communicated to criminal justice decision-makers. The process that links the event to the decision consists of three parts: encoding, transmission through channels, and decoding, as illustrated in Figure 8.1.

Figure 8.1

THE CRIMINAL JUSTICE PROCESS AS A COMMUNICATIONS PROCESS



Communication is conceived of as the overlap between the

---

56 (continued) suspects (see, for example, Kirk, 1974 and O'Hara, 1956). "Criminal investigation" is usually thought of as synonymous
(Footnote continued)

message sent and the message received. Discrepancies are regarded as "noise". The efficiency of transmission is measured in terms of energy input and the amount of information actually received. Breakdowns in the communication process can occur in any of the component processes. The signal may not be strong enough to stand out against background noise. It may be improperly encoded. The channels may lack capacity. The receiver may mistake background noise for a true signal and incorrectly decode the message. Too much might be transmitted producing an information overload. Communication is conceived of as the overlap between the message sent and the message received.

The information needed by the criminal justice decision-maker is determined by law or policy and depends upon the particular decision being made. Those decisions occur

---

56(continued)
with work of detectives. More recently, however, criminal investigation has come to the be recognized as the broad process it is. The LEAA-sponsored Managing Criminal Investigations (MCI) Project correctly argued that the criminal investigation process should be thought of as including the work of the entire police department. "While skilled detectives are often essential, there are many things police managers--from first-line supervisors to the chief--can do to improve investigative success" (Cawley, 1977:vi).

When conceived of as a communications process, criminal investigation is even broader. It includes not only things done by the police department but all the information processing activities of other agencies of justice which have information needed to make timely, accurate, and fair decisions. Thus the guality of the criminal investigation process in a jurisdiction must be thought of in terms of how well the entire network of agencies who have relevant information bring it together to assist decision making in individual cases. Weak links in the overall network reduce the performance of the system.

sequentially beginning when signals from the event come to the attention of the criminal justice system. The first decision is whether to respond to the signal (e.g., dispatch a patrol car). Next is the decision as to whether the suspicious event should be regarded as a crime. After that come the decisions relating to arrest, charging, pretrial release, and ultimate adjudication either by dismissal, plea bargaining or at trial. Each decision point in the sequence requires a complete cycle of the communication process. This is, information from the original event (plus information about the suspected criminal) must be put into a recognizable code, transmitted, and received intelligibly by the person(s) who must use it to make the decision.

In this sequential process the police are not only information gathers and transmittors but interpretors and decision-makers as well. Ordinarily, they are in the ones who receive the initial signals usually via a citizen's complaint (Reiss, 1971). The decisions to respond, to regard the incident as a crime, and to arrest are usually theirs. But, most of the charging decisions and the adjudication decisions are made by prosecutors, jurors or judges. In connection with these later decisions points the police serve as information gathers and transmittors. Prosecutors serve either as interpretors and decision-makers in the charging, plea bargaining or dismissal decisions; or as transmittors and interpretors in cases they present to the grand jury or at trial.

2. Constraints on Organizing the Process

While the criminal justice process can be reorganized to increase the quality of the communication link between the criminal event and the criminal justice decision makers, there are limits on what can be done. Achieving a high quality of communication is not the sole consideration in designing the justice process. Any reorganization must also recognize certain legal, constitutional, philosophical and practical contraints.

Because of the democratic principles of government the justice process must be accountable. Because of concerns about fairness and individual liberty there are legal and constitutional constraints on several aspects of the information processing activities of the justice system. There are limits on how information can be obtained (laws relating to searches, seizures, confessions, and the prohibition against self-incrimination); whose job it is to obtain the information (judges and juror are not to play the role of police investigator and interrogator); how long a time-frame is available for getting the information (laws relating to the time from arrest to first presentation in court, to speedy trial and to the statute of limitation); the degree of fidelity of information (rules relating to hearsay testimony, credibility of witnesses; requirements for certified/verified documents and for the chain of custody); access to the information (discovery rules and the secrecy of grand jury proceedings); what the ultimate standards for the decisions are (the standards of probable cause, a prima facie case and beyond a reasonable doubt); and the rules relating to relevance of information (exclusion of prior record at trial

as evidence on the probability of guilt).

The highest fidelity of communication occurs where there is the least interference between the original signal source and the ultimate receiver and interpretor of the information. Thus to achieve maximum communication in the justice process one might have the juror do the criminal investigation himself (i.e., go to the original sources of information and learn about the case first hand). This would eliminate the juror's reliance on all the intervening police officers, prosecutors, typists, lab technicians and others on whom juries presently depend for information about a case. But, obviously this would not only be contrary to law but highly impractical. There must be some division of labor but inevitably this results in some loss in the fidelity of communication. The more people and agencies involved in a case as sources, gatherers, respositories, transmitters and interpretors of information in a case the greater the chance of error. To the extent that information is omitted or distorted the quality of justice administered is diminished.

3. An Economic Model of the Communication Process

The communication process linking information about a criminal event as well as a criminal to a decision maker such as a prosecutor, judge or juror consists of a series of interlinked production activities in which the output of one becomes the input to the next. Typically, the sequence is as follows: a criminal event is reported to the police dispatcher; who reports it to a police patrol; who may either dispose of the matter

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entirely by themselves or may work cojointly with investigators; who in turn write reports and also verbally present their findings to prosecutors at intake and may have to repeat their verbal presentations to different prosecutors as well as to judges and juries at subsequent stages in the criminal justice process.

Each of these production activities can be examined for the costs involved using the general economic model of a producing activity present in Figure 2 below.

Figure 8.2

General Economic Model of a Producing Activity

L K

M Producing Activity X

In this model "M" is the cost of material entering the activity; "L" is the cost of the labor used in the producing activity to process the material into something of higher value; "K" is cost of capital needed to process the material into something of higher value; and "X" is the selling price of the final product. The cost of producing "X" then is determined by the equation: $X = M + L + K$.

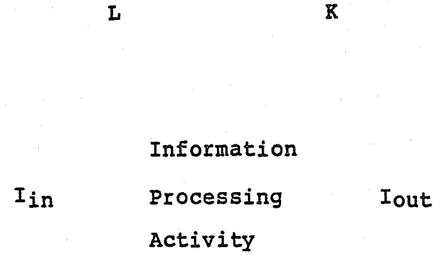
In other words, each unit in the process can be examined in terms of the "value added" to the original value of the raw input. When one has a series of interlinked producing activities the value added to the final product is equal to the sum of the

values added by each of the component units.

Given that the producing activity that police and prosecutors are involved in is information processing, this general economic model needs to be slightly modified as shown in Figure 3.

Figure 8.3

An Economic Model of Information Processing



In this model "L" plus "K" equals the cost of information processing activity and the difference of "I_{out}" minus "I_{in}" represents the change in the quality of the information as the result of passing through this information processing unit. If there is no change in the quality of information then the process involved is merely a communication system (a channel) and not an information system (a procedure for changing the quality of information) then the output ("I_{out}") becomes more expensive but of no greater value than it was before. On the other hand, if the information is enhanced in some way, then "L" plus "K" is the cost of the enhancement. It is also possible that the quality of the original information can be degraded as it passed through a

production unit. Thus, the output becomes not only more expensive but of even less value than it was at the start.

C. Information and Justice

The quality of justice is related to the quality of the information available to the decision-maker. This proposition cannot be easily quantified and measured. However, one attempt to do so has been made. Rand (Greenwood, et al., 1973) counted the number of items of information in police investigative reports and examined the relationship between the amount of information (in this numerical sense) and the pattern of case attrition in two jurisdictions. Rand found that in the jurisdiction with greater average amounts of information per case were available there was less case attrition (few cases rejected, dismissed and plea bargained).

At first glance this finding may appear to prove the point that information affects the quality of justice. But, a closer look indicates that the study is best regarded as suggestive rather than definitive. First, Rand's methodology is problematic. Their conclusion is based on a sample of only two jurisdictions. There is no assurance that the difference in attrition rates is not due to any one of a number of plausible alternative explanations. Furthermore, their research could not be replicated using the published instruments and procedures. More importantly, the conclusion that increases in the quality of information will improve the quality of justice does not necessarily mean (as they imply) that attrition rates will decrease. They may decrease, increase or remain the same; and

yet, the quality of justice could have changed dramatically. The relationship between the amount of information and case strength can go either way depending upon the inherent strength of the case. If a case is irredeemably weak not because of the absence of information but because of the inherent nature of the event (for example, there is only one witness who is half blind or the police made an unlawful search), then increases in the amount of information will show the inherent weakness in the case and increase its probability of being rejected, dismissed, plea bargained or lost at trial. On the other hand, if a case is strong (and potentially stronger), then greater amounts of information will tend to reduce the likelihood that it will be rejected, dismissed, plea bargained or lost at trial unless other conditions apply. If the case is one of the many involving defendants and victims who know each other, there is a good chance that greater information will reveal mitigating circumstances such as victim provocation. This in turn will increase the likelihood of a "lenient" disposition (Williams, 1976; and Vera Institute of Justice, 1977).

The basic point is that more information will sometimes help the prosecutor and other times help the defense but will always be a potential service to justice. Furthermore, justice is a quality of the decision made not of the information on which it is based. No amount of information will guarantee a just decision. But assuming the decision-maker is disposed to doing justice, then the amount of information will influence the kind of justice that can be done. In general, procedural justice can

be achieved on limited information but substantive justice requires greater amounts of information, especially fine detail and nuance.

In jurisdiction 7, for example, the police brought in a case which they intended to charge as robbery. As far as they were concerned it was a robbery. The defendant forcibly took property worth about $10 from the victim. If the police had submitted their traditional police report describing just this much about the case and if the defendant had received all her procedural rights and had been convicted at trial, she would have received procedural justice. But, she would not have recieved substantive justice. As it happened, this case was submitted to an experimental program of "case enhancement" as the result of an project in that police precinct. It was learned that the actual circumstances of this crime were as follows: the defendant and the victim play on the same basketball team in high school. During a practice session the victim accidentally knocked the eyeglasses off the defendant while shooting for a basket. The next day the defendant and her girlfriends met the victim in the schoolyard and stood in front of her when she tried to leave. The defendant threatened to beat up the other girl for breaking her glasses. The victim put her school bag down and began the fight which was a brief scuffle with no injuries. Afterwards the victim found that her bus tickets and small change were missing from her school bag. She called the police because she thought the defendant probably took them but she was not sure.

On the basis of this additional information a decision was

made by the project staff to not treat this robbery as if it were a true "stranger-to-stranger" robbery with a "real" threat of harm. To equate the two might have been procedurally fair because they both qualified under the law as robbery but would have constituted a substantive injustice. However, but for the presence of this case enhancement project, the police report would not have had the additional detail; the prosecutor would have had no alternative but to treat the case as a robbery; and the defendant would have gotten nothing more than procedural justice at best.

In addition to influencing the kind of justice which can be done, the quality of information affects the speed and related efficiencies of case processing. Where more information is available (especially earlier in the process) weak cases can be more easily recognized and screened out. On the other hand, strong cases can be recognized and used to convince the defense either to plead (where he might not have otherwise) or to plead earlier than he might have done. In fact, one of the best arguments for liberalizing discovery rules is that it could help speed up the guilty plea process and would reduce trials in cases of questionable strength.

ILLUSTRATION #8.1

> In our previous study of plea bargaining, defense counsel frequently pointed out that they often have difficulty convincing their clients that the state's case against them is too strong to fight at trial or to bargain for a deal better than the one being offered. Counsel say they are frequently not trusted by their clients and therefore it is hard to get them to do what is in their best interest. But, if counsel knows the state's case and if that case is a well-documented one,

> then counsel can realistically and in detail explain why the defendant "doesn't have a chance."
>
> But, of course, if the case is weak, then counsel might advise his client to hold out and go to trail.

Some police officers as well as some prosecutors recognize that full and open discovery does not have to mean the state will lose more cases. Only in jursidictions were law enforcement and prosecutorial efforts are shoddy or minimal and the system is currently relying on bluffing about case strength which is possible in plea bargaining (see, McDonald, et al., 1980) does full discovery pose this threat. Where police make good cases and have nothing to hide, discovery is not a threat and can be an asset to successful, timely and efficient prosecution.

ILLUSTRATION #8.2

> Althought the police reported in several jurisdictions that they deliberately withhold information in order to prevent the defense from getting it, some police officers took the opposite view. A detective in jurisdiction 5 reported that he always used to show defense counsel his cases because he made strong cases and counsel realized their clients did not have a chance. (The prosecutor ordered him to stop because, the detective thinks, defense counsel would get to know their cases better than the prosecutors did.)

In order to understand the impact of differences in the quality of information on the quality of justice in a jurisdiction, it is useful to perform an experiment in the mind. If nothing else changed in a jurisdiction except that the amount of information in a case went from minimal, conclusory, and unsupplemented police reports to detailed, well-documented reports enhanced by an in-person meeting between the police, the prosecutor and witness, what would happen? The pattern of case

attrition might change in either direction (greater or lesser case drop-out or greater amounts of drop-out at different points); or, the local pattern of attrition might remain the same but the kinds of cases dropping out at the disposition points would be different. That is, in this latter possibility the increased information might not increase the number of defendants going free or going to prison but it probably would change which defendants got those dispositions. All other things being equal this change would be in the direction of a fairer, more accurate system of justice.

D. The Prosecutor's Information Needs

"Facts are guesses."
--Jerome Frank

1. Introduction

The communication process operated by police and prosecutors and the problems in it are best understood by examining the process in reverse. This chapter begins that analysis by reviewing the legal criteria applicable to the arrest, charging, plea bargaining and trial decisions and the extent to which police and prosecutors agree on the amount and kind of information needed to make those decisions. It is noted that while police and prosecutors agree on the general categories of information relevant to these decisions, they disagree on the amount of detail and the value of specific kinds of information necessary to make them. Moreover, it is argued that because of the contextual nature of information, the amount of information

the prosecutor needs is always greater than even a highly efficient communication system could supply. Finally, it is shown that the police affect the prosecutor's (and juries') decision-making not only by the information they supply (or omit) but also by the way they influence the context in which it is interpreted.

2. Legal Criteria and Related Information

The nature, amount and quality of information needed by prosecutors varies by (a) the legal decision being made; (b) the goals of the prosecutor's policy; and (c) the nature of the crime and the criminal. The four legal decisions of most significance to the police-prosecutor relationship are: arrest, charging, plea bargaining and trial. The information relevant to each of these decisions is discussed below.

For arrest, the legal criterion is probable cause. The information needed to make this decision solely from a legal point of view is information sufficient to persuade a reasonable person that a crime has been committed and that the person to be arrested committed it (Carroll v. U.S., 275 U.S. 132 [1925]). What this information consists of varies according to the legal definition of the particular crime and also by the specific factual circumstances surrounding the individual criminal event. Studies indicate that numerous discreet and composite factors affect the arrest decision including: the strength of the case; the seriousness of the offense; the seriousness of the offender; the potential for further harm if an arrest is not made; the age,

race, sex, poverty, demeanor and character of the suspect; the age, race, sex, demeanor, and desires of the victim/complainant; the relationship of the victim and the offender; and still other factors (Bittner, 1967; LaFave, 1965; Sullivan and Siegel, 1972; Siegel, et al., 1974; Reiss, 1967). For certain kinds of crime there is considerable agreement among police about selected categories of (and even specific items of) information that are regarded as important in determining the arrest decision. For example, Battelle (1977a:27) found that 77% of police surveyed agreed that the extent of suspect identification was an important factor in the decision whether to arrest; 72% cited proof of penetration and 54% cited use of physical force.

The amount and type of information needed by the prosecutor at charging depend upon two things: (1) the prosecutor's policy, and (2) the type and location of the prosecutor's charging decision in the criminal justice process for a particular jurisdiction. As with arrest the legal criterion for the charging decision is probable cause. Hence, the same information relevant to the arrest decision is relevant to the charging decision. However, prosecutors must also have information relating to various other legal considerations as well (such as whether the prosecutor has substantive and geographic jurisdiction over the case; and whether the statute of limitations has expired). In addition, the prosecutor may choose to not prosecute valid cases for various reasons including but not limited to (a) equity considerations such as the defendant being very old or sick; (b) the probability that the victim/

complainant will not prosecute; (c) concern for not giving first offenders criminal records but rather trying to rehabilitate them; and (d) concern that the victim or the defendant might suffer too greatly because of the prosecution (see, generally, American Bar Association, 1979; Kaplan, 1965). Finally, the prosecutor may also decide to increase the charging standard from the legally required minimum of probable cause to some higher standard. That is, he may accept only "strong" cases.

Prosecutors' offices differ in what they try to accomplish at the charging decision. Graham and Letwin (1971) have suggested that there are as many as 8 different goals which prosecutors might want to achieve at charging. Jacoby (1979) has found four different prosecution policies in operation.[57] The legal sufficiency policy means accepting virtually all cases where the minimum legal standard of probable cause has been met. The system efficiency policy means disposing of as many cases as quickly and early as possible. The defendant rehabilitation policy means diverting and referring the majority of defendants to rehabilitative programs. The trial sufficiency means accepting only cases with a high probability of conviction.

The information needed to achieve these alternative policies varies. The least information is needed in jurisdictions with the legal sufficiency policy. The type and amount of information required for jurisdictions with the system efficiency policy depends upon whether the prosecutor there wants to dispose of

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57 For a fuller description, see Chapter 3.

cases on solid information or just on information sufficient to justify his decisions if he is ever called to account. The defendant rehabilitation policy calls for a different emphasis in the kind of information needed. Information relating to the convictability of the case is less important and reliable, up-to-date information bout the defendant's prior record and current involvement in criminal or disruptive behavior is essential. The trial sufficiency policy places a heavy premium on obtaining information about the strength of the case and the probability of successful prosecution as well as the defendant's prior record and current criminal involvement.[58]

In preparing for both plea negotiations and trials, prosecutors need information about the strength of the case including what the available evidence is, what the witnesses will testify to, how convincing they are and whether they are committed to going through with the prosecution. They also need to know about the defendant's prior record. This and additional information about the defendant's dangerous and other indications of his moral turpitude are more important for the prosecutor when plea bargaining. At trial the prosecutor only needs to know about the defendant's prior record in order to impeach his testimony if he should take the stand. But in plea negotiations, the prosecutor is acting in a quasi-sentencing capacity. The

58 Information about the defendant is needed because (in our experience) prosecutors' offices with high acceptance standards are usually willing to lower the standard if the defendant has a serious pattern of prior criminal conduct.

terms of the plea he seeks usually are ones which he believes reflect the seriousness of the criminal, his dangerousness to the community and the punishment he deserves (McDonald, et al., 1979).

3. Disagreements Over Information Needs

A recent study of the information needs of prosecutors aptly noted the disagreement that exists about what those needs are.

> Within the criminal justice system substantial lack of agreement about the types of information and relative values of the different types of information which should be collected during criminal investigations exists. Although statutes define the particular situations and circumstances for each crime type, implying what type of information is required, there is not complete agreement even within the context of a single statute as to the type of information which should be collected for each type of case (Socio-Environmental Research Center, 1980a:1).

Understanding the nature of this disagreement is essential to understanding the communication problems police and prosecutors face. The disagreements arise for three reasons: the ambiguity of legal definitions and standards; the situated character of information; and differences in the perceived value of certain types of information.

a. The Ambiguity of Legal Terminology

Legal definitions and criteria must be written in specific terms or be declared constitutionally void for vagueness. But, constitutionally required specificity is a matter of degree and convention. Many legal criteria are cast in flexible language with a certain amount of vagueness built into them by design. Their phraseology attempts to balance the contradictory need of a

legal system for simultaneously providing certainty, predictability and consistency, on the one hand; and flexibility, and universality, on the other.[59] This ambiguity in the criteria themselves leads to disagreements as to when the criteria have been met. For example, even the United States Supreme Court justices themselves come to different conclusions as to whether a certain set of facts establish probable cause.[60] These disagreements appear to be but are not really over information needs. They are over policy issues. The disagreement is not over which items of information or how much is needed but where the line set by the legal standard is drawn. The inherent ambiguity of language as well as the deliberate drafting of legal standards in flexible language prevents one from knowing precisely where those lines are drawn and requires that judgments be made as to when the lines have been crossed. This feature of law is depicted in Justice Stewart's famous comment that he could not define pornography but he knew it when he saw it.

The fact that legal criteria are indefinite and that judgments must be made as to whether a particular act (about which one has as much information as one needs) falls on one or the other side of that line means that disagreements are inevitable. People will want that line drawn lower or higher depending upon differences in their values, beliefs and

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59 See, Schur, 1968; and also, Coolidge v. New Hampshire, 403 443 (1971).

60 Peters v. New York, 392 U.S. 41 (1968).

charging standards be interpreted as minimal standards. This maximizes their authority to legally intervene in situations and to have their cases accepted for prosecution. This preference often leads to disagreements with prosecutors.

b. The "Situated" Character of Information

A second type of disagreement also arises out of the necessarily indefinite nature of legal terminology, but it is truly an information problem not a policy problem in disguise. The crux of the problem is that information cannot be treated as factual in the sense of existing independent of some interpretative framework. Rather, information is always dependent upon specific situations or occasions. If any specific act is considered in isolation from its context, it "may be affected radically and by such deep-reaching modifications as to destroy its phenomenal or experiential identity" (Gurwitsch, 1964:114).

According to this phenomenological view, events do not speak for themselves.[61] Whether an event constituted a "crime" or "just horsing around," whether a person is a "crook" or "just a nice kid gone wrong" and whether the law should be applied and in what way, all depend upon the interpretive work done by the decision maker. Moreover, the specific meaning that is given to each situation is always context-bound, not context-free or objective (Wilson, 1970). Even the most carefully drafted criminal statute

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61 For additional applications of this view to the criminal justice process, see Sanders, 1977; Daudistel, 1976; and Daudistel, et al., 1979.

(Wilson, 1970). Even the most carefully drafted criminal statute does not and cannot provide definitive specificity as to when the elements of a crime are present in particular, concrete instances. Legal definitions do not have sharp edges to their meanings. Rather, as Hart (Chambliss and Seidman, 1971) suggests, they contain irreducible residues of ambiguity. The meaning of the elements of crime must be determined in every case in the context of the particular details of each event. Thus changes in the information about the circumstances surrounding acts may lead to alternative interpretations of the acts, themselves. For instance, the business man who misses the last train home and falls asleep waiting for the early morning train appears to be doing nothing different than the unemployed drifter sleeping in the same train station. Both could be considered to be violating the law against hanging around the station without a legitimate propose, i.e., loitering. But describing the full context of the event can make a major difference in what is perceived. The businessman is in his suit and sitting propped up in a chair trying to sleep in a respectable manner. In contrast the drifter in street clothes is stretched out comfortably on the bench. This increase in detail does not change what the two people are doing but knowing it might lead one to infer that the businessman had a legitimate purpose (such as waiting for the next train) while the drifter did not (although he might have).

The implications of this phenomenological perspective for the communications process between police and prosecutors are substantial. The prosecutor needs as much detail as possible

about the context of events as well as the specific events themselves in order to interpret what happened. Moreover, every interpretation is subject to reinterpretation with the addition of more information. This places an enormous demand on the communication system between police and prosecutors for detailed information beyond simply establishing the elements of the crime. Even the most efficient communication system would be unable to convey all the details of individual events. The police convey much less. Their reports typically omit contextual material and the minimum facts necessary to establish the care.

The prosecutor's need for fine detail, nuance and contextual material is especially evident in plea bargaining. Prosecutors assess the moral turpitude and potential dangerousness of a defendant (and, hence, the severity of sentence to be sought in negotiations) by relying on subtle differences in the factual pattern of the criminal incident. This become particularly clear during the pretest of our plea bargaining decision simulation. As we have reported elsewhere the (McDonald, et al., 1979), prosecutors presented with the hypothetical robbery-with-a-knife case asked numerous questions about the precise details of the incident.

> [They] wanted to know such things as: Was the slashing completely unprovoked by the victim? Had the victim said anything at all or resisted in any way? Was the slashing necessary to accomplish the crime? Was it done out of nervousness or panic or out of simple meanness? When the robber presented the knife, how did he present it? Was there actual contact of the knife with the victim? . . . Prosecutors wanted to know not just whether there had been a slashing but how deep it was, whether there would be permanent injury or ugly scars in visible places such as on the face. This information was used by prosecutors to assess not only

> robbery with a slashing was a serious matter and had to be punished, but there was a question about the precise degree of punishment that this particular robber deserved. While the layman may think that it is enough to know that a person is a "robber who slashes" in order to decide what sentence should be imposed, the experienced prosecutor has learned to make much finer distinctions. Some robbers who slash display a much greater disregard for the wellbeing of their victims than others; and since there is not unlimited capacity in the correctional system distinctions must be made, these differences are used as the basis for making them. (McDonald, et. al., 1979:157)

The prosecutor needs as much fine detail as possible not only to evaluate the case but to negotiate from a position of strength. A major part of plea negotiations is "fact negotiation," that is, negotiations over the facts of what actually occurred. Defense counsel and prosecutors argue their versions of what happened or what a jury believe happened.

ILLUSTRATION #8.1

> In jurisdiction 13 we observed a negotiation of an armed robbery case with one co-defendant. The defense counsel argued to the prosecutor: "You've got the wrong man. Murphy (the co-defendant) says he's a passenger in his own car! Your witnesses can't even identify him. The first witness couldn't give anything--weight, height, or anything because he (the defendant) was sitting in the car. Your second witness took 15 minutes to pick him out at the line-up . . . and she says they (the two defendants) were driving around for minutes at the gas station. And, the victim can't even identify either defendant."
>
> The prosecutor counterargued that one witness was standing closer to the car than defense counsel claimed and had gotten a better look at the defendant than counsel was admitting.
>
> Negotiations broke because of this impasse over the facts; and, the case was set for trial.

c. The Value of Information: The Confessions Controversy

i. A Review of the Issue

The third kind of disagreement over information needs involves disputes over the value of certain types of information. The most controversial disagreement of this kind is over the value of confessions. On the one hand are the claims that confessions are essential to successful prosecution. A sample of such opinions are present below.[62]

> . . . [M]ore than 80% of all criminal cases are solved by confession. A defendant is seldom acquitted once his confession is admitted as evidence during his trial. Thus, for a majority of defendants, trial is a mere formality (Zimbardo, 1967:17).
>
> Today the importance of confessions . . . cannot be overemphasized. . . . In many cases there would not be trial without them, for many times the state has no other evidence implicating the defendant (Schafer, 1968:vii).
>
> How else can [crimes] be solved, if at all, except by means of the interrogation of suspects or others who may possess information? Absent a confession, the guilt of the offenders in most of these cases could not be established (Inbau, 1968:274).
>
> [A] confession is usually regarded as the clearest evidence of guilt, it alleviates doubt in the minds of judges and jurors more than any other evidence and by itself largely ensures conviction (Driver, 1967:42).

In addition one finds literature suggesting that cases without confessions are often dismissed (National District Attorneys Association, 1966; Kuh, 1966); confessions are critical and often determinative factors at trial (Aubry and Caputo, 1972); that confessions are especially convincing compared to other types of evidence (Cray, 1972); and that juries are reluctant to convict

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62 The first four of these opinions were assembled by Baldwin and McConville (1980).

defendants who have not admitted their guilt (National District Attorneys Association, 1966). On the other hand, there is literature which questions the value of confessions in solving violent crimes (Harvard Law Review, 1966); and in their necessity for prosecution (O'Hara, 1956); and whether or not they have any significant effect on the ability of prosecutors to obtain convictions (Pye, 1966).

While much of the literature on the value of confession involves the swaping of opinions among knowledgeable people, some of it has been based on empirical research. The most rigorous study of this kind has recently been completed by Baldwin and McConville (1980) in England. They found that 20% of a thousand cases would not have resulted in conviction but for the presence of confessions. American studies vary in the proportion of cases in which confessions are believed to be crucial to conviction from below 6% to as high as 26%. But, the methodologies and sampling designs of these studies have been more problematic. Sobel (1966) found that of 1000 consecutive indictments in Brooklyn, New York between February and April, 1965, fewer than 10% involved official confessions made to the police. Blumberg's (1970) study of 724 male defendants who pled guilty to felony charges found that fewer than 6% had made confessions to the police. The Yale Law Review study of interrogations in New Haven (1967) estimated that interrogations are "important" or "essential" in only 13% (12 out of 90) of the cases studied. Witt (1973), replicating the Yale study in a California jurisdiction, concluded that confessions were essential or

important to conviction in 24% of the cases in his sample. An in-house study by the Detroit Police Department for the year 1961 found 60% of all felony cases confessions were obtained but were deemed essential in only 13% of them. Furthermore the study found that in 1965 confessions were obtained in 58% of felonies but deemed essential in only 11.3%. Younger (1966) found that confessions were deemed essential to conviction in 26% of his sample (but another part of his study reports that only 10% of the cases that were decided by plea or trial were ones in which confessions were necessary).

ii. <u>Some Empirical Findings</u>

Given the controversy over the value of confessions, we explored this issue in-depth in three ways: field interviews; a secondary analysis of approximately 3,000 robbery and burglary cases from six jurisdictions; and interviews with a non-probability sample of 15 defendants in one jurisdiction. Each of these lines of inquiry led to the same conclusion. The value of confessions to the successful prosecution of cases has been overated. Confessions do not guarantee that defendants will plead guilty; and confessions usually do not significantly increase the probability that defendants will be found guilty if they go to trial. Moreover, prosecutors believe that the presence of a confession means the case will probably be weaker than it might have been. This is because when police obtain confessions they tend to ignore getting additional evidence to fortify the case.

The secondary analysis of the 3,000 cases indicates that

persons convicted of burglary are more likely to have confessed than those convicted of robbery (48% compared to 39%), see Table 8.1. For both crimes combined confessions occurred in about 45% of the cases.[63]

Table 8.1

PERCENT OF CONFESSIONS IN ROBBERY AND BURGLARY CASES WHOSE FINAL DISPOSITIONS WERE EITHER A GUILTY PLEA OR A TRIAL*

	Cases With Confessions			
	Robbery		Burglary	
	%	N	%	N
Norfolk, VA	47%	220	63%	337
New Orleans, LA	22%	146	24%	309
El Paso, TX	27%	55	34%	164
Delaware Co., PA	14%	185	15%	331
Seattle, WA	56%	217	69%	507
Pima Co., AZ	66%	85	62%	324
Total**	39%	909	48%	1972

* Source: Georgetown Plea Bargaining Study data.

** The rate of confession for burglary and robbery combined is 45%

The belief that the presence of a confession increases the likelihood the defendant will plead guilty rather than go to

63 Because of the way the sample was chosen, however, this is not an indication of the extent to which confessions occur in all arrests for these crimes. The sample excluded all cases that were either released by police after arrest, or dropped or reduced to misdemeanors before indictment.

trial is partially supported. The data suggest that this is true but only in certain jurisdictions. In half of the six jurisdictions defendants who confessed were significantly more likely to plead guilty rather than to go to trial, see Table 8.2. This was true regardless of whether the crime was robbery or burglary. But, in the other three jurisdictions the opposite was true. There was no significant relationship between confession and choice of disposition for either crime. Thus it appears that the relationship between the presence of a confession and the choice of disposition depends upon some characteristic of the jurisdiction. However, we are not able to say with any certainty what that characteristic is.[64] The three jurisdictions where a relationship exists (Norfolk, Va., El Paso, Tx., and Seattle, Wa.) do not have any characteristics in common that we can identify and logically relate to this finding.

64 One important factor affecting the value of confessions is the public credibility of the police (see discussion below). It would make sense that such a factor would rang by jurisdiction but not by type of crime. However, we can not say that that is what accounts for the findings in Table 9.2. We have no information on whether public confidence in the credibility of the police in the six jurisdictions varies in a way that would support this interpretation.

Table 8.2

RELATIONSHIP BETWEEN WHETHER DEFENDANT CONFESSED AND WHETHER HE CHOSE TO PLEAD GUILTY OR GO TO TRIAL, BY JURISDICTION FOR ROBBERY AND BURGLARY CASES

Jurisdiction	Robbery Cases				Burglary Cases			
	Confession		No Confession		Confession		No Confession	
	Pled Guilty	Went to Trial	Pled Guilty	Went to Trial	Pled Guilty	Went to Trial	Pled Guilty	Went to Trial
Norfolk, VA.	90%	10%	52%	48%	95%	5%	73%	27%
[N_R=220] [N_B=337]	$G_P < .01$ = .80				$G_P < .01$ = .74			
New Orleans, LA.	84%	16%	75%	25%	82%	18%	88%	12%
[N_R=146] [N_B=309]	G = .27 N.S.				G = -.20 N.S.			
El Paso, TX.	93%	7%	55%	45%	96%	4%	75%	25%
[N_R=55] [N_B=164]	$G_P < .01$ = .84				$G_P < .01$ = .29			
Delaware Co., PA.	92%	8%	77%	23%	96%	4%	87%	13%
[N_R=185] [N_B=33]	G = .56 N.S.				G = .57 N.S.			
Seattle, WA.	84%	6%	65%	35%	97%	3%	76%	24%
[N_R=217] [N_B=507]	$G_P < .01$ = .47				$G_P < .01$ = .80			
Pima Co., AZ.	86%	14%	69%	31%	92%	8%	86%	14$
[N_R=85] [N_B=324]	G = .46 N.S.				G = .29 N.S.			

Source: Plea Bargaining Study data.

* N_R = N for Robbery; N_B = N for Burglary

The question of whether the presence of a confession increases the probability that a defendant will plead guilty was also examined based on data from interviews with 15 convicted defendants in the Baltimore County (Maryland) House of Correction. Although the sample is small and not representative of any known population of cases it indicates that confession apparently was <u>not</u> a major factor leading defendants to plead guilty. Only 6 of 15 defendants said they had confessed; and only 2 of them felt the confession was a major factor in their decision to plead guilty.

The belief that the presence of a confession in a case strengthens it and, hence, increases the likelihood that if it goes to trial it will result in a finding of guilt, is not supported by the case file data on robbery and burglary cases in the six jurisdictions. In only two of the 12 analyses performed did the presence of a confession significantly increase the probability of being found guilty at trial, see Table 8.3.

4. <u>The Interpretative Context</u>

In his critical comments on the adversarial process of determining truth, Jerome Frank states that contrary to legal theory jurors (and other decision makers) do not <u>find</u> the facts in a case. They <u>make</u> the facts. The process of interpreting information about a case is influenced not just by what is presented by the opposing sides but also by the general context which the decision maker brings with him to the case. This includes his preconceptions and biases as well as the fund of information he has about the world. It is within this context

that the decision maker sifts and weighs the information presented and decides what "really" happened.

Recently there has been a renewed interest in research on how jurors interpret information (Simon, 1975; Lermack, 1977; Bermant, et al., 1976; and Atkinson and Drew, 1979). Our research did not set out to pursue this topic but was led to it by findings in the field and by the conceptual framework adopted. Repeatedly we heard that the police affect the decision making of jurors (and, therefore, of prosecutors) not only by the information they supply (or omit) but also by the way they affect the general interpretative context which jurors bring with them to the courtroom. A critical component of that general background information with which jurors "make" the facts of a case in the degree of credibility they have in the police. When the public loses confidence in the trustworthiness of the police, the information presented by the state at trial becomes suspect and the benefits of any doubts tend to go in favor of the defendant. The drop in public confidence in police veracity may be precipitated by one celebrated case involving only one or a few police officers. The incident may not even have occurred in the local jurisdiction. But in the public's mind the loss of credibility will spread to all police work.

Table 8.3

RELATIONSHIP BETWEEN CONFESSION AND TRIAL OUTCOME IN BURGLARY AND ROBBEY CASES

Jurisdiction	Robbery Cases				Burglary Cases			
	Confession		No Confession		Confession		No Confession	
	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty	Guilty	Not Guilty
Norfolk, VA.	90%	10%	68%	32%	100%	0%	79%	21%
[N_R = 66] [N_B = 45]	G = .62 N.S.				G = .0 N.S.			
New Orleans, LA.	80%	20%	61%	39%	39%	66%	66%	34%
[N_R = 33] (N_B =42]	G = .44 N.S.				G = -.50 N.S.			
El Paso , TX.	100%	0%	34%	50%	50%	96%	96%	4%
[N_R = 19] [N_B = 28]	Fishers Exact .68 N.S.				G = .92 P < .05			
Delaware Co.,PA.	100%	0%	64%	36%	50%	50%	64%	36%
[N =38] [N = 38] $_R$ $_B$	G = 1.0 N.S.				G = .28 N.S.			
Seattle ,WA.	100%	0%	79%	21%	100%	0%	80%	20%
[N_R = 54] [N_B = 49]	G = 1.0 P < .05				G = 1.0 N.S.			
Pima Co. , AZ.	63%	37%	67%	33%	65%	35%	67%	33%
[N_R = 17] [N_B = 35]	Fishers Exact .63 N.S.				G = -.05 N.S.			

Source: Plea Bargaining Study data

*N_R = N for Robbery; N_B = N for Burglary

While this decline in confidence can affect all aspects of police testimony, the one area it affects the most is the evidentiary value of confessions. It is surprising to find the extent to which prosecutors everywhere decry the value of confessions. Their main complaint about them is what the value of a confession fluctuates with the level of police credibility with the general public. Even in a jurisdiction which the police have in the past been held in high regard by the public confessions are risky. If a police scandal should occur, the value of the confessions in all pending cases plummets. When public confidence in the police is extremely low, the value of confessions obtained by the police is virtually nil.

ILLUSTRATION #8.2

In jurisdiction 7 where a major police scandal decimated police credibility, the prosecutor no longer accepts confessions obtained as having any evidentiary value unless they are obtained by an assistant prosecutor and are videotaped.

Some of the local police officers interpret this policy cynically as an attempt by the prosecutor to embarrass the police. Others are angered by the "good" cases where they had confessions but had to let them go because the confessions were not taken according to the prosecutor's procedure. Still other officers are demoralized at watching young assistant prosecutors ineptly fail to get confessions only to see an experienced police officer get the confession (now unusable) five minutes after the prosecutor leaves the interrogation room.

The widespread distrust of confessions and the reason for it is evident in the sample of comments from the field presented below.

> We hate to rely on confession evidence. I just lost an armed robbery where the defendant had confessed. (Chief prosecutor, misdemeanor division, jurisdiction 15)

> We've been telling the cops to forget about confessions and statements. Get physical evidence. You're crazy if you even use a statement in [this city]. If you have one eyewitness and a statement, you've got nothing in [this city]! (Chief prosecutor, screening and diversion unit, jurisdiction 8)

> Juries in [this city] don't buy oral confessions by black defendants taken by white officers. There is a confidence gap between the black and white communities. (Chief prosecutor, jurisdiction 5)

> Twenty-five percent or less of the issued cases contain any type of confession. This is partly because the police know that confessions in many cases are almost a waste of time because of the jury's reactions to them. (Assistant prosecutor, jurisdiction 15)

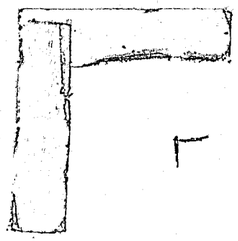
> Confessions are weakest type of evidence. Juries believe defendants when they say, "Yeah, I signed the waiver but I was afraid. They were beating me." (Police lieutenant detective, jurisdiction 5)

> Only about 20% of felony cases contain confessions. It depends on the type of crime. There are a lot in murder cases. Only a few in burglaries and a moderate number in robberies. In confession cases the defendant may claim the cop promised him something for the confession. (Senior prosecutor, jurisdiction 16, and former management consultant and advisor to the National District Attorneys Association)

> Confessions are dangerous because citizens as well as judges, prosecutors and defense attorneys may not trust a confession obtained by the police. (Assistant prosecutor, jurisdiction 6).

> If the only thing the police get is a confession, that usually means you are not going to get a conviction. Juries are skeptical of confessions taken by the police, particularly if they feel the defendant was in some way tricked or coerced into giving a statement. (Senior prosecutor, jurisdiction 9)

However, while many prosecutors said that they were not interested in relying on confessions to get convictions, it should be pointed out that these same prosecutors were interested in getting any verbatim statements made by the defendant at the



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time of arrest. Such statements are and sometimes essential.[65] Prosecutors would like to have more of them. But this is not to be confused with getting defendants to confess to crimes.

65 Some prosecutors noted that such statement are the sole or primary evidence in certain cases such as breaking and entering.

CHAPTER 9, THE TRANSMISSION OF INFORMATION

> "Inherent unreliability of evidence upon which tribunals must proceed affects all departments of judicial administration of justice. But in criminal law, where passions are aroused, where the consequences are so serious, where unscrupulous persons are so apt to be arrayed on one side or the other, the difficulties growing out of the necessity of relying upon human testimony are grave."
>
> "We are dealing here with an inherent difficulty. Yet much may be done to mitigate it which we are not doing."
>
> -- Roscoe Pound (Pound and Frankfurter, 1922:579)

A. The Primary Channels: Documents and Humans

Having reviewed the amount and type of information which the prosecutor needs, the discussion turns now to an analysis of how and why he does (or does not) get that information. This discussion is divided into two chapters. Chapter 9 focuses on the transmission process. It examines how and why the information which the police do manage to obtain (as well as other information related to the criminal event and the defendant) is lost or distorted before reaching the prosecutor (or other decision-maker). Chapter 10 examines why the police do not obtain certain information in the first place. The analysis of the transmission process begins with a description of the two primary channels through which information about crimes and criminals is transmitted to prosecutors (and other decision-makers).

Information about crimes, arrests, and criminals is transmitted to criminal justice decision makers through four channels: human beings, physical evidence, documents and electronic systems. The human beings include the victims, witnesses,

defendants and police officers. The physical evidence consists of anything which bears some trace of the event such as hair, blood, fingerprints, weapons, etc. The documentary channel consists of various reports and field notes written by police, forensic analysts, prosecutors and others. The electronic system consists of telephonic communications and all the electronic hardware used in the system (such as wireless systems, computerized data processing and other electronic transmitters and photocopiers).

Of these four channels the two most important are the documentary (more correctly, the person-to-document-to-person) channel and the human (direct, person-to-person) channel.[66] Each of these two channels has its strengths and weaknesses. Neither by itself is adequate to meet the communication (and other) needs of the system. But when operated in tandem they can complement each other. One's strength can offset the other's weakness. The documentary channel serves best as a way of conveying discrete items of information (such as, prior record; names and addresses; and the results of laboratory tests). It also provides a means

66 The other channels are, of course, important. For instance, in New Orleans the police department increased the number of telephone lines available to receive calls from the public and dramatically increased the number of crimes reported to the police.

But, the basic communication within the criminal justice system that goes on between police and prosecutors and the courts in the vast majority of cases occurs through two channels: the documentary which is actually a person-to-document-to-person channel and the direct human channel in which prosecutors interact with police officers and victims and witnesses.

of assuring consistency of information by standardizing report formats. In addition the delivery of information can be coordinated through the use of checklists. But, the documentary channel is not adequate for transmitting the fine details, nuances and shades of meanings which are so important to the prosecutor in charging, plea bargaining and at trial. Nor does it allow the prosecutor to assess the non-verbal messages given off by victims and witnesses. Thus their credibility and persuasiveness of witnesses can not be assessed. Hence, it prevents the prosecutor from determining the true strength of the case. In order to get at detail about the context of events and to assess subtle nuances prosecutors need to communicate directly with the people involved, namely, the police, victims and witnesses. For this they need the direct, person-to-person channel.

However, while the human channel has these advantages it also has its limitations. Human beings are not necessarily accurate, reliable or honest in their perception or recollection of events (see, e.g., Marshal, 1972). They are not efficient channels of information. In fact one student of human communication has quipped that "it is an act of charity to call man a channel at all. Compared to telephone or television channels man is better characterized as a bottleneck" (Miller, 1967:48).[67]

67 Of course, documentary channels are not a whole lot better than the human channels since they rely on human beings for the input. But at least once the report has been written its "memory" does not fade as easily.)

B. Factors Affecting the Transmission of Information

The loss and distortion of available information about a criminal incident and related matters is the result of a variety of factors affecting the organization and operation of these two primary channels of communication. The influence of these factors are examined below. The analysis includes an assessment of various compromises and alternative solutions to the problems posed by this component of the communication process.

The human channel has other benefits for the police prosecutor relationship besides the type of information it can convey. When a police officer communicates directly with a prosecutor several positive things can happen: (a) the officer can convey information he might not put in writing; (b) the prosecutor can give immediate feedback on police performance, the need for additional investigation, and the likely outcome of the case (all of which can potentially affect the quality of information brought by the officer in this and future cases); (c) the police can get a better understanding of the prosecutor's needs; (d) informal social ties between police and prosecutors can develop with them the possibility for informal communication networks helpful to the overall process of law enforcement; and (e) prosecutors have greater control over the case which minimizing police efforts to defeat screening standards and slip in weak cases.

1. Economic Factors

As always, financial resources place a limit on what can be done. The ideal communication system is the redundant, two-

channel system with a well-managed documentary channel operating along side an extensive person-to-person human channel. But this arrangement is also the most expensive one. A less expensive alternative would be to rely primarily on the person-to-person channel. An even less expensive system would be to rely primarily on the documentary channel (which could be even less expensive if the requirements are minimal).

The costs of the person-to-person channel include personnel and transportation costs for the police, prosecutors and witnesses. Over the last two decades two changes have dramatically increased the costs of this channel: increases in the price of oil and increases in the cost of police appearances in court and at the prosecutor's office. Oil price increases have doubled and tripled the cost of trips to the courthouse; but even bigger increases have occurred in the cost of police overtime pay for court-related work. Prior to the 1960's when police unions began securing better police benefits, police overtime costs related to court work were minimal. In some jurisdictions the police were expected to testify in court either on their own time; or on time compensated by taking leave during his regular tour of duty (usually at the convenience of the department). In some places the officer was paid at his regular rate of pay. Today that has changed. In all jurisdictions visited time spent by the police in court and at the prosecutor's office is paid time. Typically, they are paid time-and-a-half with a minimum of from two to four hours. This has skyrocketed costs. Court time is now one of the major items in police

budgets. For instance, in 1979 the District of Columbia Metropolitan Police Department spent 249,485 hours in court at the cost of $1.4 million. In the same year in Montgomery County, Maryland (suburban to Washington, D.C.) the 710-member police force cost $197,000 in overtime for court time. In Philadelphia with a 7,500-member police force it costs $4 million for court overtime pay to the police (Knight, 1980:B1). This has forced jurisdictions to revise their methods of communication. Central to this reconsideration in the relative merits of alternative methods of organizing the transfer of cases from the police to the prosecutor. Jurisdictions which used to be able to afford to have each police officer bring his cases to the prosecutor's office for review and charging are now looking for less expensive alternatives. The main costs and benefits of possible alternative arrangements of this critical interface between the two organizations are examined below.

2. Alternative Methods of Case Transfer from Police to Prosecutor

Three critical aspects of the method of case transfer from police to prosecutor are: (1) whether cases are brought over individually by the officer who is knowledgeable about the case or whether cases are transmitted in batches; (2) if batch processing is used, whether the person delivering the cases is simply a delivery person or whether he familiarizes himself with the cases and serves as a partial substitute for the officer who made the case and knows it best; and, (3) whether the prosecutor who receives the case is an experienced trial attorney who knows

what information is needed "downstream" and is not intimidated, overwhelmed, or easily deceived by the police officer delivering the case.[68]

These three critical dimensions combined to form 8 different possible arrangements describing case transfer, as illustrated in Table 9.1. The best possible arrangement from the point of view of maximum communication is the arrangement indicated by cell 5. This is where the police officer who made the case (and hence has the most information about it) brings it over individually and reviews it with an experienced prosecutor. Under this arrangement the case is reviewed by someone who knows what the downstream information needs are. Much of the contextual information and fine detail which is typically missing in police reports can be obtained immediately because the person who knows the case best, the officer in charge of it, is there.

Cues as to the credibility of the police officer can be read as well as other information which the officer may not want to

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68 In some jurisdictions there is no early screening by prosecutors or cases may be transferred to prosecutors through the court. Thus in these jurisdictions prosecutors are forced to rely on the documentary channel for information about a case at the early and intermediate stages of the process. But after the formal accusation has been filed, the prosecutors may supplement the documentary information by calling on the police and witnesses for an in-person discussion.

Therefore, some of the points made in the narrative that follows about the importance of person-to-person channel of case transfer are relevant to this post-formal accusatory communication. But the real thrust of the remarks are directed at jurisdictions where there is some police-prosecutor interaction in cases at a much earlier point in time.

Table 9.1
METHOD OF CASE TRANSFER FROM POLICE TO PROSECUTOR BY TYPE OF CASE PROCESSING, TYPE OF CASE CARRIER AND TYPE OF PROSECUTOR RECEIVING CASE

Type of Case Carrier	Batch Processing		Individual Case Processing	
	Experienced Prosecutor	Inexperienced Prosecutor	Experienced Prosecutor	Inexperienced Prosecutor
Police officer with knowledge of the case	1	2	5	6
Police officer without knowledge of the case	3	4	7	8

put in writing, such as his suspicion that the arrestee is the person responsible for certain other crimes. The specific information needed in follow-up investigation can be identified and the officer can be clearly and unequivocally given the responsibility for getting it. If the case is rejected or if there are other faults in it, the prosecutor can give immediate feedback on the reason for the rejection and the faults in the case. Such in-service training can enhance the quality of the information supplied by that officer in future cases. If the case is weak and needs to be rejected or charged at a lower level, the experienced prosecutor will usually be better able to withstand police pressures for case acceptance and high charges. Finally, informal ties between police and prosecutors can develop

out of these interactions.

While this arrangment described in cell 5 has many benefits it also has its costs. It is the most expensive arrangement of all due to the costs of transportation, over-time pay for the individual police officers and and the cost of having a prosecutor available virtually full time. A cost-benefit analysis might show that some of the costs of this arrangement are offset by savings due to early case screening, in-service training, and more effective prosecution due to strong cases. But in the meantime jurisdictions which have this arrangement are modifying it in an effort to cut costs.

The least expensive (in the short-run) arrangement of the case transfer process is the one indicated in cell 4. This is where cases are batch processed, carried by an officer unfamiliar with them and delivered to an inexperienced prosecutor. This is also the arrangement with the least communication potential both in terms of learning more about the case and getting feedback, training, and developing informal communication ties. The other arrangements in Table 9.1 represent various degrees of and kinds of compromises between this arrangement with its minimum communication potential and lowest cost and the other extreme.

Of the eight possible arrangements (plus the ninth possibility that there is no direct person-to-person contact between any police or prosecutor in the early or middle stages of the charging process) only five were seen in the field.[69] The

69 The four not seen are represented by cells 2, 4, 7 and 8.

arrangement in cell 5 occurs in four jurisdictions for all felonies and in two more jurisdictions for very serious felonies or career criminals. The arrangement in cell 6 occurs in 5 jurisdictions for all felonies and in one jurisdiction for felonies not involving career criminals. The arrangement in cell 3 occurs with one of the major police departments in one jurisdiction. The arrangement in cell 1 occurs in one jurisdiction for all felonies and another jurisdiction for less serious felonies.

One possible cost-saving modification in case transfer procedures for police departments which formerly transferred all cases by the individual officers in charge is to establish two tracks with the more expensive method is used for the more serious cases. This has been tried successfully as illustrated below.

ILLUSTRATION # 9.1

Prior to about 1969 cases in jurisdiction 13 were transferred individually by the arresting police officer who delivered his case directly to an experienced prosecutor. Frequently the victims and witnesses would be there as well and a kind of mini-trial would be conducted. However, with the increase in police overtime costs, the police department moved to a batch processing system combined with a squad (as opposed to an individual) responsibility for cases. That is, all cases were brought over by a courier who knew nothing about them. As they progressed through the system the arresting or investigating officer would attend only those court hearings and prosecutor briefings which he could attend while on regular tour of duty. Otherwise, another member of the squad would attend (unless, of course, the officer were required to testify).

This change brought a storm of protest from the prosecutor because it dramatically decreased his ability to get information from the officer in the case and it eliminated the main source of case continuity. The

prosecutor's office had been organized along horizontal ("zone defense") lines. Thus the only person who followed the case through each step of the process had been the police officer. When the case finally reached trial, the prosecutors had formerly relied upon the officer in charge of the case (not the documentary system) to fill them in on everything that had gone on before and why.

With the new police policy of using squads, this was no longer possible and prosecutors began losing cases. Because of the strong protests from the prosecutor's office, the police department eventually adopted a compromise position. For certain enumerated, very serious cases, it uses the old one-man one-case policy. For all other cases it uses a modified version of the new policy. Instead of all cases being batch processed together at headquarters each precinct has its own case courier. His job is not merely to transfer cases but also to familiarize himself with them so that he can respond to inquiries from prosecutors. Meanwhile, the prosecutor's office has installed the PROMIS system, thereby improving the ability of its documentary system to supply case continuity.

Another solution to reducing the cost of case transfer while preserving the ideal of individual case processing with interaction between police who know the case and experienced prosecutors is to extend the hours of the prosecutor's availability for case screening and, simultaneously, to reduce the number of officers called per case.

ILLUSTRATION # 9.2

In jurisdiction 16, again in response to the increasing cost of police overtime, prosecutors in cooperation with the police developed two new procedures. First, the police were asked to indicate on their reports which officer, of all the officers listed, was the one who knew the case best and in effect was the principal officer. Previously this was unclear and prosecutors had called to the case review session all officers listed on the report only to find that several of them had trivial roles in the case. Secondly, the prosecutor's officer operated its screening division during the evening shift one night a week. This was sufficient to catch all officers who had been working night and weekend shifts so that they could do the case

review with the prosecutor while on duty (as opposed to on overtime).

There are two other possibilities for minimizing costs of achieving the ideal of an interaction between the police officer familiar with the case and an experienced prosecutor. One is closed circuit television links between police and prosecutors. The other is computer-assisted case evaluation and transfer. The first has been tried in the field. The second would need to be developed but parallel technology exists in other fields. The experience in one jurisdiction which tried electronic linkages between police and prosecutors for case transfer (especially for case review and charging purposes), indicates that such hook-ups should consist of three components: an audio, a visual, and a hard copy documentary transmitter. Without all three the prosecutor loses control over the situation and the interaction between police and prosecutor is not what it should be.

ILLUSTRATION # 9.3

At one time jurisdiction 8 had a federal grant to pay for placing assistant prosecutors in the police precincts to help them screen cases through direct person-to-person interaction with the arresting officers. When the funds ran out, the prosecutor's office could no longer staff the project and went to a compromise version. They attempted to do by telephone what the original project had done in person. The police was supposed to call the assistant prosecutors who were no longer stationed at the precincts but in the prosecutor's office. However, the situation rapidly deteriorated. The police no longer called in every case and the prosecutors lost control. Cases started coming through the system which the police claimed prosecutors had approved but prosecutors knew they had not.

Therefore, the prosecutor's office installed a telecopier so that all written documents such as warrants could be transferred to the prosecutor for his inspection so that he could control what he was signing off

on. In addition, they installed a television link to add a greater control to the interpersonal interaction between police and prosecutor.

At the time of our visit this new system had not been operational long enough to evaluate it. But, it seemed that if the electronic linkage is going to work at all, these three components are needed.

An alternative method of case transfer which has not been developed much less tried but which has great potential would be a computer-assisted case evaluation and transfer method. The basic logic of the method would be the same as that used in similar computer applications to other fields, such as computer-assisted medical diagnosis (see generally, Horn and Cleaves, 1980; Pritsker, 1979 and Shannon, 1975). The computer assistance that we envision would be one that would help in the evaluation, write-up, and transfer of a case. The scenario for this system is as follows.

ILLUSTRATION # 9.4

The officer in charge of the case would sign on to a computer terminal located at his precinct. He would interact with a computer program that would ask him to describe the basic facts of the case much as a prosecutor would if he were interacting in person. Through a series of additional questions the computer would find out about the case, the number of witnesses, their names and addresses, the characteristics of the defendant, the available evidence, and whether various elements of the crime were there.

When the interaction is completed the computer would produce various documents and other products including the basic police report, a list of follow-up things to be done, printed subpoenas, a rank ordering of the priority to be given to the case (using either local priority criteria or criteria developed by national research), feedback on police error, and reasons for case rejection, if the case were rejected.

The expected advantages of the computer would be: (a) savings in transportation and waiting time for police, (b) approximating the experience of a trial

prosecutor in the interaction without having to man the screening until with such experienced prosecutors; (c) feedback to police; (d) case rankings; (e) case consistency; (f) various documents printed clearly and in multiple copies if necessary; and (g) computer links to other existing record files so that prior criminal record information could be integrated into the report.[70]

Of all the case transfer arrangements described above, we recommend that jurisdictions make every effort to achieve the person-to-person interaction between the police officer familiar with the case (and also lay witnesses) and an experienced prosecutor. However, when financial limitations make this arrangement not feasible, then we recommend the jurisdiction adopt the next alternative arrangement that is financially feasible and most closely approximates this ideal. In our view, of the alternatives mentioned above, the rank order of desirability is (1) television and telecopier hook-ups; (2) extending the prosecutor's hours of availability to do case review; (3) a dual track system of prioritized cases in which the person-to-person track is used for the most serious cases; (4) batch processing with a courier familiar with the case before delivering it; (5) batch processing with an uninformed courier. If a computer-assisted program is developed and proves as useful as ew believe it could be, then we would give it our second highest rating.

3. Legal Factors

Some of the general legal constraints on getting, transmitting and using information have already been mentioned.[71] Here attention is called to the significance of five particular legal requirements affecting the transmission process and their impact on the work of police and prosecutors: (a) the requirement that a legally acceptable record of the transmission of information be established; (b) that the chain of custody of physical evidence be preserved; (c) that documentary material be authenticated; (d) the Freedom of Information Act; and (e) discovery rules. Of the five, the last two are the major cause of problems for the police and prosecutors.

The Freedom of Information Act and increasingly liberalized rules of discovery have opened police and prosecutor files to public inspection in a way that has never been possible. One impact of this has been to make the police more wary than every about what the put in their written reports. Because of the danger of civil suits for slander or other matters, the police are less willing to commit themselves in writing to opinions about the defendant's character and seriousness as a criminal. Therefore, if prosecutors want to get police opinions on this point they usually have to do so through the verbal channel. In addition to such judgmental material, these laws also encourage the police to omit basic information about a case from the written file. The police do this in an effort to protect victims, witnesses, informants, and the strength of the case. They feel that by not putting this information in the report they

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70 The value of some of these things listed here will become even more apparent in subsequent discussions of this report.

71 See Chapter 8.

are better able to keep the defense from getting it and using it to their advantage.

The legal requirements regarding the chain of custody, authenticated documents, and the record of the transmission of information are less of a direct problem for police and prosecutors. We heard only a few scattered complaints by prosecutors about police breaking the chain of custody. But one related problem was mentioned as significant. The more police officers who get involved in a case, the more complicated it gets and the more difficult it becomes to successfully prosecute. This is the result of the legal requirement that all these witnesses be, at least, potentially available for examination.

4. Personal Factors

Some of the reasons why information gets lost or distorted in the process of being transmitted from police to prosecutor are related to personal attributes of the individual police officers involved. There are three categories of reasons: skill, knowledge, and motivation.

One obvious basic skill needed by the system is to be able to communicate clearly both in writing and verbally. Every system has some documentary component which the police officer must fill out; and every officer is a potential witness in court where verbal skills are needed. Police and prosecutors recognize that these skills are important and to varying degrees emphasize them in these training programs. In jurisdiction 5 the deputy chief of the police department has compiled a list of the most

frequently misspelled words in police reports and uses it in training and retraining officers. In jurisdiction 3, the first assistant district attorney teaches in the police academy and emphasizes the skills police officers need when testifying in court. In some jurisdictions the level of these skills is fairly low. In jurisdiction 11 the police prosecutor liaison officer reported that because of affirmative action the police department had hired officers who could not even spell such simple words as "arrest."

In addition to communication skills, the police must have the knowledge of what the prosecutor needs to know. On this point there is a widespread view among police and prosecutors that many police do not appear to know what the "downstream" information needs of the prosecutor are. An indication of the nature and distribution of the weaknesses in police reports can be seen in the results of our national telephone survey to police and prosecutors presented in Table 9.2. The single most frequently cited complaint of prosecutors (cited by 25% of the responding prosecutors' officers) was that the police omitted information, specifically, detail, in their reports.

Table 9.2

POLICE AND PROSECUTOR RESPONSES TO TELEPHONE SURVEY QUESTION REGARDING QUALITY OF POLICE REPORTS

POLICE: How would you assess the overall quality of the police reports submitted by your department to the Prosecutor's office? VERY GOOD, GOOD, AVERAGE, POOR, VERY BAD

*PROSECUTOR: A. How would you assess the overall quality of police reports submitted to your office? B. How would you assess larger department reports? VERY GOOD, GOOD, AVERAGE, POOR, VERY BAD. What would you say is wrong with the reports?

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE*	MISCELLANEOUS COMMENTS MADE BY: POLICE	PROSECUTOR
CALIFORNIA				
San Bernadino	Good	A. Good B. Good	Should be more concise and to the point.	Poor-organization, ackward writing style.
San Francisco	Average	A. Good B. Good	Details left out	Left out details
Alameda/Oakland	Good to average	A. Average B. Good	Not thorough enough	Lessening of quality Not detailed enough Time problems.
Santa Clara/San Jose	Average to Good	A. Very Good B. Good	Inexperience responsible	Officers trained in report writing.
Riverside	Good	A. Good B. Good	Depends on the individual	Not enough detail
COLORADO				
Jefferson	No	No	-	-
CONNECTICUT				
Litchfield	Good	A. Good B. No response	Fails to put down necessary elements	-
FLORIDA				
Palm Beach	Excellent	A. Average B. Average	-	Not complete, Hearsa Written in 3rd per
GEORGIA				
Muscogee/Columbus	Very Good	A. Poor B. Poor	-	Poorly written, not able to put in wri
INDIANA				
Vigo/Terre Haute	Very Good	A. Average B. Good	Too much investigation is done & 99% of time D.A. will not act upon.	Too much technical points and terminology
Lake/Crown Point	Good	A. Average B. Good	-	-
LaPorte	Good	A. Very Good B. Good	Not enough detail All factors not investigated	-
IOWA				
Scott/Davenport	Good	A. Good B. Good	Inexperience of officers.	Ambiguous

Table 9.2 (continued)

LOUISIANA Caddo	Very Good	A. Average B. Good	-	Reports are too difficult to follow Not concise/detail
MAINE York	Average	A. Varies B. Good	Incorrect English and grammar	Varies from v.good to v. bad. No clerical back-up.
MARYLAND Cumberland	Very Good	A. Average B. Good	Lacks minute details	No written standards.
MASSACHUSETTS Norfolk	Good	A. Average B. N/A	All reports approved thru Sgt. & Chief of Police.	-
Worcester	Fairly Good	A. Good B. Varies	Reviewed by Lt.	-
MICHIGAN Kent City	Good	A. Varies B. Good	Lack of detail in follow-up investigation	Varies from poor to very good.
Ottawa Beach	Good	A. Good B. Very Good	Lack of detail in follow-up invest.	Depends on Jurisdiction.
Genesee/Flint	Very Good	A. Varies B. Varies	-	Depends on Depart.
MINNESOTA St. Louis/Duluth	Satisfied	A. Very Good B. Poor	Background on witnesses needed	City reports -v. good, smaller -poor
NEW JERSEY Monmouth/Freehold	Average	A. Very Good B. N/A	Training on pertinent info neglect. Poor penmanship.	As of Oct. 1, uniform police reports
NEW YORK Orange County	Very Good	A. Varies B. Same	-	Not possible to ans
Erie	Very Good	A. Varies B. Same	Needs more detail to actual crime	Not thorough enough
NORTH CAROLINA Wake/Raleigh	Very Good	A. Average B. Average	-	Lack of information
Mecklenburg/Charlotte	Good	A. Average B. Average	Lack of communication skills	Inadequate attention to details.
OHIO Clark	Good	A. Average B. N/A	-	Not enough detail

*Prosecutors' responses are not directed towards any particular police department, they reflect their overall opinions on the quality of police reports as a whole.

Table 9.2 (continued)

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	PROSECUTOR
OREGON				
Clackamas	Average	A. Average B. Poor	Not detailed enough	Too narrative
PENNSYLVANIA				
Philadelphia	Good	A. Average to Good B. Very Good	Misspelling, typographical errors	Details not important to D.A.
Lackawanna	Average	A. Below Average B. Very Good	Lack of detailed information	Do not demonstrate probable cause for arrest.
Lehigh	Average	A. Average B. Good	Written skills needed.	Depends on depart.
TENNESSEE				
Sullivan/Kingsport	Good	A. Good B. N/A	D.A. has forms	-
TEXAS				
Nueces/Corpus Christi	Average	A. Good B. N/A	Standard of education, Officer is illiterate.	-
Marion/Lubbock	Good	A. Good B. Good	Handwritten, difficult to read	-
Jefferson	Good	A. Good B. Good	Has standard forms	-
Brazoria/Angleton	Good	No Response	-	-
McCellard/Selby Co.	Average	A. Good B. Good	Lack of info.	Not well versed.
VIRGINIA				
Newport News	Very Good	A. Good B. Good	Not enough detail	-
Norfolk	Very Good	A. Good B. Good	Setting up new system of pre. & post testing.	-
WISCONSIN				
Waukeskaw	Very Good	A. Good B. Good	Typographical and grammatical errors	Too brief

Some of the ommissions by the police are the result of a lack of skill and knowledge but a lot are due to a lack of motivation. The police are not motivated to transmit information to the prosecutor because their arrest-orientation and because there are few positive incentives and many disincentives for transmitting information. The disincentives include the drudgery of writing reports; the possibility of being criticized for an inadequate investigation; the potential for being caught in perjury or for inconsistent statements; the chance of being made to look foolish; and the possibility of weakening the case. There disincentives were illustrated by various reports from the field.

ILLUSTRATION # 9.5

In jurisdiction 7 a police lieutenant with over 10 years experience reported that he always put the minimum information in his police reports because there was no motive to do otherwise and because putting more down "gives the defense counsel a second shot at you."

ILLUSTRATION # 9.6

In jurisdiction 9 the police dictate their police reports and, on the advice of the prosecutor, destroy their original field notes after checking them against the transcripts. This is to prevent defense counsel from finding discrepancies between what is said in the notebook and what is said in the dictated transcript. One experienced prosecutor told us, "Your notebook (the police field notebook) is your worst enemy." Pointing to our own field notes, he explained how a skillful attorney could emphasize their sketchiness, illegibility, and occasional inconsistency. This could raise reasonable doubts in the minds of jurors as to the reliability of the original and the cleaned-up, dictated version of the same notes. On the other hand, the dictated and transcribed notes appear far more reliable.

ILLUSTRATION # 9.7

In only one of the 16 jurisdictions visited is the quality of the written reports of police officers specifically singled out as a criterion for judging police performance for purposes of promotion and merit increases. Thus in most places there is no positive incentive built into the institutionalized police reward structure for writing good reports.

ILLUSTRATION # 9.8

In all jurisdictions the writing of reports is regarded by police officers as an annoying burden and not "real police work." (This observation has also been made by others, see, e.g., Feeley and Lazerson, 1980.)

ILLUSTRATION # 9.9

In many jurisdictions police officers reported how unpleasant it is to be grilled on the witness stand by defense counsel seeking to discredit or make fools of them or to impune their competence and integrity. For some of them this provided a strong incentive to minimize what they put in their reports. (For others, it was an incentive to maximize what they reported.)

ILLUSTRATION # 9.10

In jurisdiction 8 there is a positive disincentive to write good reports. One police officer reported that some officers deliberately write incomplete reports knowing that this will force the prosecutors to require them to come for a review session to explain the case. By doing this the officer is able to get the minimum 4 hours overtime pay for court work and can make up to $120 extra pay.

In addition to omitting information there is the problem of the police distorting the information they transmit or adding information that did not exist. There are various examples of this. One common one is known as "making the case on the typewriter." It refers to the practice of reconstructing what

actually occurred on the street in order to meet legally required facts and conditions. Prosecutors learn that the reports of some individual police officers and certain entire police departments always "sound better than the facts really warrant." In one city this was found to be the result of an institutionalized practice in the police department. The detectives dictated their reports to a clerk typist (a lay person) whose job it is to fill in and expand them as need (Socio-Environmental Research Center, 1980b).

Over a half a century ago Pound (Pound and Frankfurter, 1922:579) described the police practice of distorting information and explained some of the reasons for it. His account continues to have validity today.

> [The] inherent unreliability of oral evidence of witnesses is aggravated by the bad influence of police esprit de corps. The unfortunate convictions of Beck and Edalji in England, which will long remain classical examples of convictions of the innocent in modern times, were clearly traceable to determination of the police to convict innocent men whom they had erroneously assumed to be guilty. The testimony of experienced trial lawyers who have written memoirs or reminiscences is uniform to the effect that the testimony upon which prosecutors must chiefly rely is apt to be so colored and warped as to be subject to grave doubt. Serjeant Ballantine, whose long experience in prosecuting and defending entitled him to speak with authority, says that esprit de corps, antipathy toward the criminal classes, the habit of testifying so that it ceases to be regarded as a serious matter, and the temptation which besets police officers to communicate opinions or theories to the press, thus "pledging themselves to views which it is damaging to their sagacity to retract," so operate as to cause serious and even fatal miscarriages of justice. The student of criminology may verify this abundantly by study of American criminal trials. Yet from the nature of the case such testimony is the best available."72

72 In Rochester, N.Y., at the time of our visit several
(Footnote continued)

In some places the police have developed ways to keep the distortion to a minimum. In one major city, the police reported that they carry an extensive auto-wanted list with them on patrol. This way they are "always" able to find a car generally matching the description of some car on the list. Thus they can always provide "legal grounds" for stopping virtually any car they care to stop.

5. Technological Factors

Some of the loss and distortion of information transmitted to the prosecutor is due to certain aspects of the physical technology of the documentary system including: (a) the format of the reports; (b) whether dictation is used; (c) whether the reports are typed or handwritten; (d) and the quality of the copies that can be made from the report. The limits of the physical technology, however, can be enhanced in various ways. These problems and their solutions are discussed below.

It is hard to believe in an age of electronic word processing that the physical technology of transmitting information could be such a major problem for the prosecution of criminal cases, but it is. Prosecutors have lost or inappropriately disposed of cases because they could not read the handwritten police reports or because the reports were illegiably copied. The problems with the physical technology begin with such

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72(continued) sheriffs' deputies had just been convicted of falsifying their testimony in a case they were determined to prove against a dangerous criminal.

fundamental questions as how police reports should be formated. Some writers (e.g., Leonard, 1970) and practitioners advocate the use of detailed, highly structured formats. They argue that the more structured form will reduce omissions of specific items of information, increase the consistency of reporting, and decrease the drudgery, time and expense of filling out reports. Others have argued against such forms on the grounds that it is impossible to create a form which anticipates every important unit of information; that different crimes require different legal elements be proven and hence require different items of information be included; and that prosecutors cannot get a sense of how the whole case goes together from reading a report that carves it up into lots of little boxes. Prosecutors need a narrative synopsis of the case that pulls the whole case together.

There is truth to both sides of this argument as our field visits indicated. In jurisdictions which use highly structured forms[73] prosecutors complained that the forms encouraged the police to be too concise in their narrative reports and to assume that if there is no box for an item of information on the form, then there is no need to be put the information into the report.

ILLUSTRATION # 9.11

> Arguing the case that "once you start to structure them (police forms) the police will only answer the things you ask," a prosecutor described a situation which he said was all too common. "You'd be at trial and the cop would say to you, 'You're really gonna hammer it to

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73 Including ones using the exceptionally structured forms used in the Managing Criminal Investigations project.

him (the defendant) when old Joe gets up and testifies.' And you would look at the cop and ask, 'Who's old Joe?' 'Why, he's the eyewitness who saw the whole thing go down.' So you ask the cop why he didn't mention it in his report and he tells you, 'Because there was no box for it.'"

It seems that the answer to the formating question lies somewhere in the middle. The reports need to be structured; but the prosecutor also needs a narrative synopsis giving a meaningful sequence to the case and explaining who all the people listed in the case are, what they did and saw, and how they fit into it. There also must be a way to ensure that relevant information not required by the form but useful to the case can and will be added. Several different methods are available for enhancing police reports to achieve these goals. They include having someone (either prosecutors, detectives, patrol officers, case couriers, or secretaries) enhance the basic police report or using dictation equipment; or developing and using the computer-assisted case evaluation and transfer technology described earlier.

In jurisdictions where the police and prosecutor interact at an early case review, the prosecutors fill out their own case file on the basis of the written police report plus the interview (and, in some jurisdictions an additional interview with witnesses). This arrangement allows the prosecutor to enhance the police report, adding missing detail and supplying a narrative synopsis. In other jurisdictions it is up to the detective to enhance the report. But, this can become a major misallocation of expensive investigative resources. In jurisdic-

tion 8, for instance detectives have become little more than highly paid and poorly skilled typists. They prepare all reports for all cases. They estimate they spend 80% of their time typing reports. Virtually no investigation of street crimes such as robbery, burglary occur unless for some reason they become newspaper items.

In one jurisdiction, an experimental program is being tried which allows arresting patrol officers to spend more time enhancing their own reports. Although the program has not yet been evaluated, it appears to have had some positive results.

ILLUSTRATION # 9.12

The program is operated in one precinct by the police department in jurisdiction 7. It is designed to enhance the police reports sent to the prosecutor but focuses only on felonies in which there are "happenstance" field arrests by patrol officers. In other precincts these arrests receive no follow-up investigation and the police reports contain very little detail and are basically written in conclusory language.

Project members illustrated the later point with a real case. A teenage girl told a young boy in a grocery story he should put his money in his stocking hat because there were robbers in the neighborhood. After he did she grabbed the hat and the money ($75) and ran. According to project staff "the typical police report in this kind of case would call it a 'robbery' and would read as follows: ''Defendant forcibly took $75 from the complaining witness.'" No context to the crime would have been given. The experimental project is designed to supply that context. It allows the patrol officer to take time at the station to interview the defendant and the witness and to complete a report in much greater detail.

Project staff believe the project is having an impact on case processing. They believe there has been a major reduction in "overcharging" by the police; and they know there has been a change from 11% to 24% increase in the prosecutor's rate of case acceptance of the most serious felony cases.

Some jurisdictions have required that the officer who carries cases over to the prosecutor in batch processed form familiarize himself with the case. This, however, does not relieve the detective division or the patrol officer of the job of producing and supplementing the initial report; and, it does not represent a major enhancement of these initial reports.

Still other jurisdictions have provided police officers with dictation equipment in order to get better reports. We heard mixed reactions from police and prosecutors regarding the value of this equipment. Prosecutors generally favored its use and believe they get better reports from it. Police administrators were divided. In one city a police department abandoned dictation because of the problems it created. But another city the police did not have the same problems and are pleased with their dictation system.

ILLUSTRATION # 9.13

In jurisdiction 8 dictation was tried and abandoned because (a) stenographers were being subpoenaed by defense attorneys to testify in court; and (b) the system was allegedly "too expensive" requiring additional personnel. (However, this particular reason is suspect since all reports are now being typed by highly paid detectives). (c) There were difficulties in getting stenographers to work evenings and weekends.

ILLUSTRATION # 9.14

In contrast in jurisdictions 9, 15 and 17, the police departments use dictation equipment and the problems reported by the police chief in jurisdiction 8 have not occurred. Furthermore, the prosecutors in these jurisdictions are delighted with the amount of detail in the reports that they receive from the police. The one danger they stressed with the dictation equipment is the problem of "information overload." Unless the dictation is guided by some structured form, the police

can submit too much information which can make it just as difficult for the prosecutor to handle as too little information.

Still another method for enhancing the documentary system is the use of checklists to ensure that all bits and pieces of a case get coordinated before delivery to the prosecutor's office. Included on these lists are such things as arrest reports, line-up reports, chemical analysis reports, rap sheets, ballistics test reports and sundry other items of information which must be coordinated.

Yet another method of improving the transmission of information is being tried in a jurisdiction enhancing police reports by using law students and a special, guided inquiring system between typists and arresting officers at the time of filling out their reports.

ILLUSTRATION # 9.15

The purpose of this "case preparation" project in jurisdiction 17 is to use paraprofessional aides to "structure, organize and type police investigations at the time of booking or warrant issue. This procedure is expected to lead to improvement in the thoroughness of police investigations in the sense that there will be fewer omissions of vital prosecution information; fewer overt investigative errors which lead to case dismissal or radical plea bargaining; and a shorter lime lapse between arrest and the time that the details of the case are forwarded to the District Attorney's office.

The project has experimented with various ways of doing this. In the end the prosecutor's office developed a series of forms (different forms for different crimes) with questions to be asked of the arresting police officer that determine whether the elements of the crime are there as well as other information about the crime. Originally the project tried having the police officers read the forms and fill them out themselves. Subsequently, the project found it is best if the secretaries asked the police the questions and typed

their responses. Thus the typists are acting as prosecutor surrogates in this guided interaction. A structured report form is filled in by the typist but in addition the typist prepare a narrative synopsis of what occurred.

A prosecutor familiar with the police reports in that jurisdiction before and after the project reported the project is a tremendous success. While he did not have statistical information to evaluate its impact on case attrition, he said that based on his own personal experience the quality of prosecutions has increased tremendously. He illustrated the change with a case he was working on which involved the arrest of a man with bulging pockets standing near a closed car wash. When the police asked the man what he was doing he explained he was looking for employment. At that moment the burglar alarm sounded at the car wash. In the report the officer mentioned in the narrative section that there were other police officers involved in the case as back-ups. This information would not have been noted in the standard form used prior to the project. In addition, the narrative section mentioned that the police fingerprint personnel were sent to the scene. This also would not have been in the normal report. In addition, it mentioned that the fingerprint section found no prints--something which would not have been mentioned in the regular report.

> The report that would have been written prior to the project would have simply stated that the police had grabbed the suspect on the scene. This, the prosecutor noted, would have given the prosecutor's office very little to go on. Knowing everything else that happens in a case is "very helpful to the prosecutor writing the indictment and super helpful to the prosecutor at trial."

This project is jurisdiction 17 suggests that the computer-assisted case evaluation technology recommended earlier is feasible. If typists with high school education or less can be used to produce reports based on interactive questioning of the police guided by inquiries developed by prosecutors, then a computer could be similarly programmed. As in jurisdiction 17's project different questions could be asked depending upon elements of the crime to be proven. Multiple copies of the

police report developed by the computerized interaction could be printed simultaneously in the police station and at the prosecutor's office. The copies would be typed and legible; would have the benefit of a "prosecutor's" review of the case; would be consistent; and would save the various costs of transportation and personnel involved in the transmission process. In addition, a computer could be programmed to rank order the daily or weekly police and prosecutor dockets according to criteria such as the probability of conviction, the seriousness of the offender, the seriousness of the crime, or the need for follow-up investigation.

C. Presentation at Trial

A critical part of the transmission process is the presentation of information in court by the police and prosecutors. This is the final link between the criminal incident and ultimate decision-makers the jurors or the judge. Special skills and efforts are required if this presentation is to be done accurately and persuasively. Both police and prosecutors complain that these skills and efforts are often lacking. The problems seem to lie in the lack of training, the lack of preparation, and the lack of necessary techniques on the part of both police and prosecutors.

The youth, inexperience, and lack of preparation among prosecutors were frequently complained about by police as reasons for poor trial performance, as has already been mentioned.[74] Here the discussion focuses on the specific complaints prosecutors

have about the police in their role as witnesses. In brief, the complaint is that although the police are by occupational necessity professional witnesses they often do not act like "professionals." The melange of prosecutor's complaints is as follows: Some police do not review their notes before testifying. Some do not look at the jury when talking to them. Some do not dress in a professional manner. (One showed up in a T-shirt with the word "FUZZ" printed across it.) Some act like it is their first time in the courtroom (sometimes tripping over the chair on the witness stand). They either give too little or too much in their answers. ("With some it is like pulling teeth. Others try to win the case for you with sideboard remarks like, 'He (the defendant) said he knew it was his watch because it was the one his wife gave him the last time he got out of prison.')" Many use stilted, jargonistic language. Many use the same catch phrases repeatedly like robots never adding any color, imagination, individualization or convincing quality to them.

ILLUSTRATION # 9.16

> One prosecutor making this last complaint reported, "In every drunk driving case the officer always says he knew the driver was drunk because of the 'wobbly walk, slurred speech and blood shot eyes.' In one case defense counsel said to the officer, 'Did you say eyes, plural, officer?' When the officer answered affirmatively, counsel had his client take out one glass eye and roll it on the table."
>
> Continuing, the prosecutor noted that the police wrongly believe that the law requires them to talk in a monotone, Sergeant-Joe-Friday way and use stilted language like, 'the perpetrator exited the vehicle and proceeded to flee' instead of saying, 'He got out of his car and ran.'"

74 See Chapter 2.

The police did not know how to quote the profanity used by the defendant (or others) without offending the jury or making it seem as if they were using the profanity themselves. They do not know how to correct errors or omissions or inconsistencies in their testimony which they honestly and accidentally make. Thus, they either leave themselves open to being found inconsistent by the defense or they back themselves into corners where they can be made to look very foolish or be forced to lie their way out it. They do not know how to respond to trick questions designed to fluster and discredit them.

ILLUSTRATION # 9.17

> Defense counsel will ask the police, "Did you discuss this case with the prosecutor before trial?" If the officer answers, "No," defense counsel will suggest that the police and the prosecutor didn't care enough to prepare for the trial so the jury can infer that it's not something the state really wants convicted. If the officer answers, "Yes," counsel will suggest that the testimony was "rehearsed."

Four main reasons appear to account for why police are not better witnesses: (a) lack of training at the academy; (b) lack of experience at trial;75 (c) lack of pretrial preparation and post-trial feedback from the prosecutor; (d) failure of the police reward structure to emphasize performance as witnesses.

D. Summary and Conclusion

75 For many police trial work is a rare event, in jurisdiction 7 a lieutenant with 17 years experience, 10 as a detective, said he had been to court only once.

The two primary channels for case-related communications between police and prosecutors are the documentary channel and the person-to-person, human channel. These channels have strengths and weaknesses that compliment each other. The documentary channel is best for conveying discrete items of information. The person-to-person is needed to convey greater amounts of information and fine detail. Prosecutors need both kinds of communication. One of the major reasons why information needed by the prosecutors is not received by them is that one or the other of these two basic channels is not being used or not being used well. A second major reason for the omission or distortion of information is that there are virtually no incentives and many disincentives for the police to transmit information. Various options exist for striking reasonable balances between financial constraints and the improved transmission of information from police to prosecutor. The maximum feasible communication system but also the most expensive is to have the two-channel system with a good documentary channel operating in tandem with a person-to-person interactive system in which the individual police officer familiar with the case would interact with an experienced prosecutor. Less expensive alternatives to and compromises with this ideal are available and can be arranged in such a way as to devote the greatest resources to the most serious criminals and crimes.

CHAPTER 10 DISCOVERING AND OBTAINING INFORMATION

A. The Meaning of "Discovery"

One part of the case-related communication breakdown between police and prosecutors is due to problems in the transmission process. Information which the police have does not get fully or accurately transmitted to the prosecutor. The other part of the problem is that the police do not discover certain information to begin with. The reasons for this second part of the problem are examined in this chapter.

When prosecutors complain that the police do not "get" the neccessary information they may be referring to any one or all of three distinct things: (1) locating information (evidence); (2) recognizing the evidentiary value of information that has already been located; and (3) manipulating potential sources of information in order to obtain information. These three components of the discovery process are explained below.

1. Locating Information

Information about a crime and the criminal is located in two places: in the field and in some official records of the criminal justice system (primarily, prior records information, but also other police intelligence reports about current criminal activity). It is useful to discuss the problem associated with these two efforts separately.

a. Information in the Field

Any understanding of how the police locate crimes and criminals and how this affects the prosecution of the case must begin by recognizing four facts. (1) The vast majority of crimes come to the attention of the police as the result of citizens' calls to the police (Reiss, 1971). Only a small proportion of crimes are located by the police as the result of proactive policing. (2) The vast majority of crimes that are solved (i.e., a suspect is identified) by the police are solved on the basis of information supplied by the witnesses and contained in the initial police report (Greenwood, et. al., 1975). For the most part they are not solved on the basis of new information generated by police investigative activities. (3) For the purposes of prosecuting a case successfully the best evidence is the information (evidence) available and obtainable at the scene of the crime as soon after the criminal event as possible. Collaterally, in regard to those cases where the defendant is not apprehended at the scene but at some later time, the best evidence (information) obtainable from that suspect is the information obtainable at the time of arrest and initial questioning. (4) In the vast majority of cases the type of police officer who is the first officer to reach a crime scene and also usually the one who makes most arrests is the officer with the least training, experience and understanding of the information needs of the prosecutor, namely, the patrolmen (Reiss, 1971).

The prosecutor's complaint about the police failure to locate information (evidence) about crime is not about finding

crimes that would otherwise not have come to the attention of the criminal justice system nor is it about identifying suspects. Rather, it focuses on the police failure to obtain certain information at the scene of the crime, at the scene of the arrest, and at other field locations for those cases which the police refer to the prosecutor for action.

Some things which prosecutor commonly complain that police do not obtain are listed below.

1. Fingerprints: Prosecutors recognize what the public does not, namely, that obtaining fingerprints in many cases is a waste of time. But they also know that in some cases it is essential to have fingerprints.

Illustration #10.1

A trial prosecutor in a large eastern city pointed out that fingerprints are essential evidence in some cases, especially murder cases. The "classic" case is the not infrequent situation of the murder of elderly people living in changing neighborhoods. Their bodies will be found in the home and the house will have been ransacked. Frequently the only way to place the defendant in the home is with fingerprints. Furthermore, failure to get the prints in situations where they obviously could have been gotten weakens the case in other ways. This prosecutor recently had such a murder case in which a 15-year old boy confessed to the killing of an elderly couple. According to his story he had been in the house for two hours in the course of ransacking and murdering the couple. The prosecutor was sure that his fingerprints were "all over everything." But, the police did not bother to get prints. When the case went to trial the defendant acclaimed that the confession had been beaten out of him by the police; and, the defense attorneys used the fact that the police did not get any prints to support the argument that they had beaten a confession out of the defendant. They argued that if the defendant had really been in the house for two hours his prints would have been everywhere and the police would not have needed the confession. They suggested to the jury that they consider the reasonable inference that since no prints were produced it must have been because the defendant really was not there.

"Obviously" the alternative explanation did not make sense, namely, that he left fingerprints everywhere and the police didn't bother to get them.

This particular prosecutor complaint was not against individual policemen but against the entire police department which he said has a general policy against emphasizing the collection of fingerprints. He claimed that in 11 years as a prosecutor he had never seen a fingerprint in a case. Furthermore, he described another case where an unidentified female body was found under a bridge and it was suspected that the girl was somebody who had been missing from upstate. The prosecutor's office sent the police to the girl's apartment for fingerprints. But, the city police reported that they were unable to get any of her fingerprints from her apartment! The prosecutor's office then sent the state police who brought back 10 fingerprints.

2. Specific elements of the crime: Prosecutors say that the police do not know the legal elements of crimes well enough to know what specific pieces of information need to be obtained to prove to case. For instance in burglary cases it is important to know whether the defendant had the permission of the owner of the dwelling to enter the house. But, the police frequently fail to determine this.

3. Witnesses/complainants: There are several aspects to the prosecutor's complaint here. Basically, the complaint is that police do not get the names and correct addresses of witnesses. This problem is especially acute when it comes to the burglary of business establishments and rental property where the prosecutor needs to know the legal owner of the property. Another aspect of the complaint is that police fail to get enough witnesses or all the relevant

witnesses.

4. Eliminating defenses: Police fail to eliminate certain defenses that could be quickly destroyed with a small expense of police time. Typically this involves checking out the story that the defendant gives the police at the time of arrest and thereby establishing whether the defendant's alibi is the truth of a lie. Either outcome would be useful to the prosecutor.

5. Failure to triangulate: Prosecutors complain that the police stop their investigations after getting one kind of evidence such as confessions or eyewitness identifications. They do not recognize the need for redundant or multiple sources of evidence in order to protect the strength of the case.

Illustration #10.2

A midwestern prosecutor described a case where a defendant robbed three victims at gunpoint in a restaurant. During the course of the robbery the defendant answered a telephone call. The robbery took about 20 minutes from beginning to end.

The police caught a suspect fleeing the scene and had the three victims positively identify the suspect. Because of the positive identifications the police did not bother to obtain fingerprints from the telephone in the restaurant nor did they bother to check out the defendant's alibi that at the time of the robbery he was at a bar two blocks away. Several months later in preparing the case for trial the prosecutor discovered that the three witnesses were contradictory in their descriptions of the suspect. One recalled that he was wearing white pants; the other thought it was stripped pants; and the third thought it was black pants. With such inconsistency among the witnesses the strength of the case rapidly deteriorated. At that point the prosecutor sent the police back to check the alibi but the bartender at the place where the defendant claimed he had been could not remember the events of that night. Furthermore, it was too late to obtain

fingerprints from the telephone. The case ended in an acquittal at trial. Afterwards the jury asked the prosecutors why the police had not checked out the alibi.

The police tend to make errors of omission most frequently in cases where they catch the defendant redhanded. Apparently the police feel that such cases are so strong that they do not have to worry. Sometimes they become overconfident about the case and do not even do the obvious things that should be done.

Illustration #10.3

In jurisdiction 12 there was a bank robbery followed by a high speed chase ending shortly thereafter with the police apprehending the robber. However, the police did not bring the victims of the robbery to the arrest scene for an immediate identification of the suspect. In the opinion of the prosecutor reporting this incident, the police failed to do the on-scene identification because they had assumed they had a strong case. However, the case was eventually lost because of the identification problems.

6. Verbatim statements: Prosecutors complain that when the police do get confessions from defendants they only report to the prosecutor that "the defendant confessed to the crime." Prosecutors prefer to have the verbatim statement of the defendant rather than the conclusion of the police that the defendant had confessed. Verbatim statements sound more plausible and credible to juries and are more difficult for the defense to deny or explain away.
7. Fine detail: Prosecutors complain that police fail to supply the necessary fine detail required to prove points in court.

Illustration #10.4

One common error in burglary cases is where the policeman does not get all the information as to who the last person who left and first person to go into the home after the crime. This is not a fatal error. It can be salvaged later on, but it would be efficient to have this done early.

In burglary and receiving stolen property cases a common police error is that the police report will describe the stolen property but will not indicate how the items were identified by the victim. For instance, the victim of a burglary may tell the policeman on the scene, "That's my radio," but the law wants to know how does the victim know it is his radio. Are there any initials scratched on it? Does he have a sales slip with a model number on it? Are there any identifying marks to prove that it was his radio and not somebody else's? For instance, a husband may say "that's my wife's jewelry," but he might not be able to identify it with certainty at trial to the satisfaction of the law. This could be enough to raise a reasonable doubt.

B. Information from Justice System Files

With regard to "discovering" information that already exists in the police or other justice system files as the result of the defendant's having been previously involved in the system, there are several problems. The basic problem is the management of the criminal records files. These files are often incomplete, especially with respect to the conviction information, and are frequently unreliable. The second difficulty with the files is the problem of linking a suspect to his existing prior record. It is especially difficult to do this when suspects use aliases. Failure to find a previous record results in the defendant being treated as a first offender. This in turn means he will be treated with inappropriate leniencey at the bail, charging and plea bargaining decisions.

Illustration #10.5

It is frequently this failure to link a suspect to his prior record that lies behind the all too frequent

situation that outrages the public. Some heinous crime is committed by a defendant while he is on pretrial release. The news media report the subject had been through the criminal justice system many times before and has always been treated leniently. This in fact is true but the reason for it is not always bleeding heart decision makers but a failure in communication.

In the District of Columbia, concern about the crime committed by people on pretrial release led to the passage of a preventive detention law which permits detention on the basis of a suspect's dangerousness (as opposed to his risk of fugitivity). That law had been rarely used. One of the main problems in implementing it is the problem of linking incoming suspects to their prior records within the time between arrest and the bail hearing (Bases and McDonald, 1972).

It has been argued that linking a suspect to his prior record may not be as important as linking him to reliable police intelligence on his current criminal involvement which may not yet have resulted in much if any of a criminal record. The argument is that the real danger to the safety of the community is not necessarily the defendant with the extensive prior record. (Greenwood, 1979). Surely some of these defendants are dangerous. But many of them have already peaked in their criminal careers and are old defendants aging out of criminal activity. The real menance to society is the young criminal who is actively involved in a series of crimes but either has not yet been caught or may have only a juvenile record. In some of these cases the police know through various means (including their informants, calls from citizens, and their own patrolling efforts), that certain individuals are responsible for a series of crimes. But they cannot prove it. The problem for the police prosecutor communication system is to be able to locate this information when it is needed. When the suspect is arrested for some

offense, if the police do make their reliable information known to the prosecutor, not prosecutors will take it into account in their decision making.

Several jurisdictions have responded to this problem by developing "hit lists." These are lists of persons who are regarded by the police and/or prosecutors as the "worst" street offenders. These lists are compiled on various bases and are based on the view that a few offenders account for a disproportionate amount of crime. By putting these offenders on a list in advance of their being arrested, it is possible to reduce the chance that they might not be correctly identified when they do enter the system; and, it is possible to increase the speed with which they are identified and hence the speed with which prosecution can commence (a factor which increases the strength of the case).

Illustration #10.6

In New York City a hit list has been initiated as a key component of a project to improve police-prosecutor cooperation and stronger and faster case building. The project began in response to a Rand study which found that 12% of the felons in New York commit 61% of the felonies. The police department developed a list of a thousand or so of the worst street felons based on arrest records, prison records and the experience of anti-crime police commanders. The idea is for the police department to build stronger cases against these offenders getting directions from the district attorney as to what is necessary to make cases convictable (Bureau of National Affairs, 1978:2094).

Illustration #10.7

In jurisdiction 2, the prosecutor asked all of the local police departments to submit to him the names of the most serious, dangerous offenders in their jurisdictions. The police were allowed to decide what constituted seriousness themselves using police

intelligence and prior record information. Defendants on this list would be given priority prosecution.

It bears mentioning that an important part of the problem of using "hit lists" or other police intelligence in decision making is that most prosecutors require that the police judgment about the current criminal activities of a suspect be established in a reliable way. Contrary to what many police officers apparently believe, prosecutors are willing to take into account in their decision making police intelligence about a defendant's current involvement in crime--even in the absence of any substantial criminal record. But, before giving such information any weight prosecutors want some assurance that it is reliable.

Illustration #10.6

In several jurisdictions we heard the same basic point made by prosecutors about the value of police intelligence. If an officer presenting a case to the prosecutor simply says he wants "the son-of-a-bitch put away because he's a bad actor," the prosecutor will dismiss the remark as possibly a personal vendetta for being hassled during the arrest or possibly police punitiveness. On the other hand, if the officer says the police want the defendant to get the book thrown at him because the police have certain information about him, then the prosecutor will give more weight to the police request. For example the officer might report that in three of the four recent burglaries in a certain neighborhood the defendant was seen by police within a few blocks of the burglaries or that the neighborhood citizens group has reported that while the guy has only been arrested for one malicious mischief, "everyone in the neighborhood knows" he is responsible for the series of tire slashings and other vandalism that has hit their neighborhood.

2. Recognizing the Evidentiary Value of Information

The second version of the prosecutors' complaint that police fail to "get" information is that they fail to recognize the

evidentiary value of the information that is available to them. Consequently, they do not pass it along to the prosecutor. The most frequently cited example of this is the police failure to recognize the value of false exculpatory statements by defendants. According to many prosecutors, the police seem to be laboring under the misconception that unless they have a signed, written, complete confession from a defendant, anything less is useless for the purpose of prosecution. What the police do not understand is that such false exculpatory statements can be used by prosecutors both at trial and in plea negotiations to strengthen their position. If the alibi can be checked out and established to be a lie then the state's case is greatly enhanced. Even where the alibi is not checked, it can be used against the defendant to show that he has made prior inconsistent statements. Thus, it can be used to prevent the defendant from dreaming up some plausible alibi after he had had time to reflect on the case and discuss it with his attorney. Also, the threat of showing prior inconsistent statements can keep the defendant from taking the witness stand (a tactical advantage to the prosecution).

3. Manipulating Sources for Information

The third version of what it means to "discover" or "get" information refers to the problem of extracting information from human and physical sources by lawful and humane means. For the most part this topic refers to two specific problems. The first is that the police fail to elicit from witnesses and victims

their correct names and addresses as well as useful testimony. Secondly, it refers to another aspect of the problem alluded to above, namely, the police fail to get defendants to make false exculpatory statements. That is, not only do the police fail to recognize the value of such statements when they are made but they do not make sufficient efforts to get defendants to make such statements.

B. Factors Affecting the Discovery and Obtaining of Information

We turn now to an attempt to understand why the police fail to discover or obtain the information needed by the prosecutor. Where we can, we will point out solutions that have been or might be tried for resolving these problems. Many of the same general factors relevant to why the police do not transmit information (see preceding chapter) are relevant to the discovery problem. But, the specific content of those factors differ; and, in some cases, their effects do as well.

1. The Arrest Orientation

Once again, the most fundamental issue is the definition of the police role in the criminal justice process. The fact that very little in the police reward structure (beyond personal pride) encourages the police to adopt a conviction-orientation goes a long way toward explaining why the police do not see it as their responsibility to do the extra work necessary to get additional information to make a case as strong as it might be.

2. Plea Bargaining and the Lack of Feedback

Plea bargaining and the lack of feedback from prosecutors on case outcome and the reasons for the dispositions are two factors which simultaneously contribute to the problem of police not getting enough information. Plea bargaining is often the prosecutor's solution to all but the fatal mistakes made by the police in making cases. In the present study and our previous study of plea bargaining[76] we were frequently told by prosecutors that poor police work is not infrequently a major reason why some cases must be plea bargained. Some police officers recognize this to a limited extent. (This is what lies behind one version of the complaint about prosecutors being too convicted-oriented. The police know they have not built a strong case but they want the prosecutor to use plea bargaining as a substitute for doing the necessary additional investigative work to build a really strong case.)

But the police do not have a systematic, statistical overview of the extent to which their failure to make cases strong contributes to the plea bargaining process. Prosecutors do not give systematic, instructive feedback to the police that would allow them to identify the extent to which police errors or omissions have contribute to the decision to plea bargain or to determining the terms of the plea bargain. This lack of feedback

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76 Plea bargaining in the United States, Grants Nos. 75-NI-99-0129 and 77-NI-99-0049 from the Law Enforcement Assistance Administration, U.S. Dept. of Justice to the Institute of Criminal Law and Procedure, Georgetown University.

perpetuates the police perception that minimal investigative efforts are enough. After all, so the perception goes, as long as you can get the case accepted by the prosecutor, he can always get something out of it in plea bargaining. Alschuler (1968) also found this perception among the police and concluded that the institution of plea bargaining actually fosters low standards of police investigative effort. In our view it is not plea bargaining per se that fosters poor police work. Rather, it is the lack of systematic feedback which would allow the police to know the consequences on case outcomes of their mistakes and omissions which prevents the police from developing a more sensitive appreciation of the information needs of the prosecutor. Simultaneously, this lack of feedback perpetuates the traditional, arrest-oriented definition of the police role.

3. Economic Factors

Economics is always a limiting factor in how much effort can be devoted to any particular aspect of the police or the prosecutor's function. The lack of financial resources is often cited by both police and prosecutors to explain their own failures as well as those of the other agency. But, this explanation usually explains too much. It is often used to hide the real issue. The question is not how much more evidence (information) the police could supply the prosecutor if they had double or triple the resources. The question is, "Why are police dollars being spent the way they are rather than in some other allocation of manpower and priorities?" With the funds currently available, the police

have a choice. One oversimplified but illustrative version of that choice is between generating a higher volume of weaker cases or a lower volume of stronger cases. A limited budget does not mean the police cannot provide prosecutors with stronger cases. It only means that some other police priority will have to be reconsidered. However, a limited budget in an atmosphere where organizational rewards are tied to high arrest volume but not linked to making cases strong will mean that cases will not be as strong as they could be.

4. Organizational Factors

One of the fundamental trade-offs in organizing police and prosecutor work is to strike an appropriate balance between minimizing operational costs and getting the most experienced decision maker as close to the best source of information as possible.[77] As already noted, the best source of information about a crime is at the crime scene; and the best source of information about an arrest is at the arrest scene and at the time of the arrest. However, the police officer who is most likely to be the first at both of those scenes is usually the least experienced and knowledgeable officer, the patrolman. The typical police solution to this problem has been to adopt a policy of limiting the nature of the patrolman's role in case investigations. The limits on that role vary by police department and within police departments by seriousness of the

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[77] And, of course, not violate the other considerations of speed, legality, accountability, fairness and justice.

crime. One extreme is to limit the patrolman to merely "securing the scene of the crime" and calling in the "real cops," the detectives, who take over the case and work it up from there. A more moderate policy is to allow the patrol to do this initial work-up especially on minor crimes and to call in the detectives on more serious crimes. In "very serious" crimes the detectives will be called to the scene of the crime, itself. Otherwise, they will pick up the case after the initial report of the patrol officer has been filed.[78] In a few jurisdictions an added resource is dispatched to very serious crimes including either a legal adviser employed by the police or an assistant prosecutor on call to the police.

In 26.5% of the 16 jurisdictions we studied, the patrol officers never do the complete investigation in the sense of writing up both the initial report and doing any required follow-up work necessary to prepare the case for prosecution. In these jurisdictions all cases are funneled through the detective division which, in theory at least, adds some information value to the report before passing it along to the prosecutor. In reality, we were told in some jurisdictions that for many of

78 The definition of what constitutes "serious" and "very serious" varies by jurisdiction. Typically, it is only the large jurisdiction with a high crime problem that distinguishes between "very serious" (e.g., certain murders, including all killings by police, rapes, and high publicity crimes) and just plain "serious" cases (e.g., armed robbery, burglary, and grand larceny). In smaller jurisdictions anything as serious as a burglary may be treated as top priority and a detective may respond to the scene of the crime.

these cases there is little value added to the report by the detective.

Illustration #10.7

> In jurisdiction 8, as in all jurisdictions, patrol makes the initial response to the scene. Patrol never does the complete work-up on a case except for very minor cases. Rather, patrol officers are expected to complete their activities within approximately 20 minutes on the scene. Their investigative function is generally limited to observing the scene, searching for witnesses, and transporting victims and witnesses to a regional detective bureau. At the bureau, a detective interviews victims, witnesses and the patrol officers, and then personally types all report forms. The result of this system is that for virtually all minor and serious crimes (except for very serious crimes) there is virtually no investigation performed beyond what the patrolman puts into his initial report. Detectives rarely go into the field; they spend 80% of their time typing; patrol officers complain that they are not given any credit for ability to investigate; and prosecutors say that they rarely get physical evidence or well-investigated cases.

a. Managing Criminal Investigations

In some cases the failure of detectives to add anything to a case is due to the fact that there is little more to be done. In other cases it is a matter of priorities. The detectives have substantial caseloads and have to decide which cases to devote their efforts to. Recently, the LEAA-sponsored Managing Criminal Investigations (MCI) project inaugurated a system designed to help detectives set priorities among their caseloads. But, from the point of view of the prosecutor, the MCI system has two major limitations: It is only intended for use in cases where the suspect has not been identified. Thus, it provides no guidance regarding how much of the detective's energies should be devoted to enhancing the cases where a suspect has already been

apprehended and the case is being processed for delivery to the prosecutor. Secondly, it is only designed to prioritize cases on the basis of probability of successfully identifying the suspect (see Cawley, et. al., 1977 and Cawley, et. al., 1979). It does not prioritize cases according to the probability of their being successfully prosecuted.

In some ways, MCI is actually antithetical to the needs of the prosecutor.[79] It unintentionally contributes to the further glorification of arrest as opposed to conviction as a major goal for police. To some extent there is an inverse relationship between the probability that a case will be "solved" (i.e., a suspect identified) and the probability that the case will be prosecuted. This is because the same conditions which make it easier to identify a suspect also make it more likely that the prosecutor will not want to prosecute or will want to plea bargain it out to a lenient sentence. For instance, one of the "solvability factors" in the MCI system which strongly affects the priority of a case is whether the victim knows the defendant and can identify him. But, it is precisely those cases where victims and defendants know each other (especially domestic and neighborhood disputes) that prosecutors are least interested in prosecuting to the fullest extent (see, e.g., Vera, 1977; Williams, 1976; and Williams and Lucianovic, 1979). Other

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[79] At least this is true of the first generation of the MCI project. We are told that in its second version an attempt is being made to build in considerations of the needs of the prosecutor.

aspects of the MCI program, however, are potentially beneficial to the prosecutor's interest in having cases thoroughly investigated.

Illustration #10.8

> In particular, the MCI program, as we observed it in jurisdiction 1, has created a standardized pattern which all officers must follow in investigating cases. For instance, in burglary investigations the officer must check at least two neighboring residences and ask if anyone witnessed the crime or saw anything unusual.
>
> The better, more conscientious detectives would probably have done this in any event. But, now with MCI all officers must do it because there is an item on the police report form asking whether this was done. As some of the detectives pointed out to us, the MCI system did not necessarily make good detectives better (in the sense of giving them new ideas as to where to look for information). But, it did make them and all other officers more consistent. Moreover, it brought the general level of investigative work throughout the department up to a minimum standard of acceptability and consistency. For the prosecutor this, of course, meant that the extra search for witnesses, for example, which in the past would only have been done by more conscientious officers, would not be done in all cases.

b. Enhancing the investigative role of the patrolman

One component of another LEAA-sponsored program, the Integrated Criminal Apprehension Program (ICAP), is also relevant to the problem of getting the most information out of the best sources, the crime scene and the arrest scene. A major tenet of the ICAP program is that the investigative role of the patrol officer should be increased (Grassie and Krowe, 1978; and Grassie, et. al., 1978). Five of our 16 jurisdictions had ICAP programs. To varying degrees they had adopted a policy of allowing patrol officers to work up all but the most serious cases as far as they could. In jurisdiction 12 the rule of thumb

developed by the police department is that if a suspect is a local person and no leads go outside the city limits, then the patrol officer will do virtually all of the investigation.

Although the ICAP program is being evaluated, there is no systematic data yet on the impact of enhancing the investigative role of the patrolman on the quality of police work from the point of view of the prosecutor.[80] However, in one ICAP jurisdiction a prosecutor expressed the view that despite the existence of ICAP the quality of the police reports was still uneven. This, perhaps, is to be expected unless at the same time that the patrolman's investigative role is enhanced he is also given the necessary training regarding the information needs of the prosecutor.[81]

In another ICAP jurisdiction a substitute (or supplemental) arrangement has been made to ensure that the investigative efforts of the patrol officers meet the needs of the prosecutor. A "police-court" liaison officer position has been created. This person, a sergeant, reviews cases prepared by patrol with an eye towards the needs of the prosecutor. Inadequate reports are sent back for further work.

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80 It is doubtful that this particular issue can be addressed in the evaluation data being collected because the evaluation design does not contain either an experimental design or a before and after design with respect to this particular feature. Another complicating factor is that the ICAP programs usually contain more than one component, thereby confonding the effect of the implementation of any single component.

81 This was anticipated and is built into the program plan for ICAP program, see Grassie, et. al. 1978.

c. Team Policing

Still another LEAA-supported program relevant to getting the best police talent as close to the best sources of information as possible is team policing. These programs have various formats and goals (President's Commission on Law Enforcement and Administration of Justice, 1967:53; and Sherman, et. al., 1973). One common theme is to close the historical gap between the patrol and detective functions. In some cases this is done by increasing the patrol officer's responsibility for investigating cases. In other cases it is done by creating teams of officers with patrol and investigative duties combined under a unified command. One of the hopes of this approach to policing is to reduce the boredom of patrol work and simultaneously create an incentive for patrol officers to do a better preliminary investigation by allowing them to see the case through--in some cases, to final disposition. In theory, the patrol officers will take greater interest and pride in their investigative work because of their new responsibility for the disposition.

Unfortunately there is not yet any systematic evidence on this point. The one major evaluation of team policing (Sherman, et. al., 1973) did not look at these programs from the prosecutor's perspective. Our own findings in this regard are based primarily on our findings in jurisdiction 15. There the team policing program was tried and abandoned. It was regarded as a failure both by the police and the prosecutors.

Illustration #10.9

In jurisdiction 15 the team policing consisted of teams of investigators and patrol officers who were supposed to work together. A special squad room was designed so that each team had its own set of desks just outside its own glassed office area where the team's investigator worked and where interviews with suspects were conducted. Patrol officers were allowed to pursue any investigation they chose with the permission of the team's commanding officer. One patrol officer had been in plain clothes for four months while pursuing a lead he uncovered that a group of local physicians were trafficking in illegal drugs.

The reasons given by the police for the failure of the program were not entirely clear. It was suggested that: (a) inequities in workloads among the police began to develop. Some officers would investigate a lot of cases and others would investigate very few. (b) Without specialization in a particular type of crime, certain advantages of specialization were lost. For example, you could not develop a modus operandi file or special skills needed to do investigations. (c) With patrol officers working investigations, the number of troops on the streets were reduced. (d) Contrary to expectations, the prospect of doing investigations was not a major incentive to many patrol officers.

The original program has been abandoned but a residual program remains. Individual patrol officers have the option of pursuing investigations if they care to. Currently about 15% of the patrol officers exercise that option. The lieutenant reporting on the program said, "We're now letting water seek its own level. After two years of team policing we now have a happy medium. Some cops just like to do arrests and that's all they do. Others like to follow cases through." This lieutenant found the outcome of the team policing experiment ironic. Prior to the experiment when the detectives did all the case work after arrest, the patrol officers complained that they didn't have an opportunity to do more in the case. Then when given the opportunity, the majority of them did not take it.

From the point of view of the prosecutor in that jurisdiction the team policing experiment was "a bust." Previous to the experiment he felt he had "great detective work." But, during the experiment, team policing cases were being worked by "amateurs." He said it takes years to become a good detective.

c. Career Development/Rotation of Assignments

Yet another way of increasing the investigative skills of the patrol officer is through a program of "career development" or in-service training. In jurisdiction 12 this is done by rotating all officers in the department through all the various assignments. Patrol officers are assigned to serve as detectives for six months to a year. The program is praised by the police but criticized by the prosecutors. The police appeared to not only enjoy the opportunity for a change in assignment but also to learn more about the function of the prosecutor and his information needs. The prosecutor's complaint was that the program meant that his office was constantly having to train new police officers assigned as detectives. The prosecutors made the same complaint that the prosecutors in jurisdiction with the team policing made, namely, that the program meant that cases were being investigated by "amateurs." One prosecutor complained that it amounted to institutionalizing mediocrity. Instead of allowing for specialization and the accumulation of expertise among a few detectives, it meant that the general standard of investigative work sank to the lowest common denominator. However, this need not happen. A program of career development could be operated in tandem with the traditional practice of allowing some officers to specialize in detective work. The rotating patrol officers could be assigned to the less serious cases where if errors are made the consequences are less disastrous.[82]

There was an amusing irony in the baleful complaint of

prosecutors in jurisdiction 12 that "as soon as we break them (the rotating police officers) in and make good detectives out of them, they rotate out of the assignment." We had heard that complaint many times before. But it had always been from the police complaining about prosecutors moving on as soon as the police had trained them in how to be prosecutors. The two versions of the same complaint point up the fundamental need for a continuing program of in-service training for both police and prosecutors.

d. Prosecutor On-Call and Roll Out Programs

Still another way of enhancing the knowledge and expertise of the police officer (be it patrolman or detective) at the crime and arrest scenes is to provide him with legal counsel, preferable an experienced prosecutor. Various organizational arrangements for accomplishing this are in use. They all appear to improve the quality of the investigation at the crime and arrest scenes and to simultaneously benefit the local police-prosecutor relationship in other important ways including increasing the trust, good will and mutual understanding between the two agencies.

The two main differences in the programs that exist are: (a) whether the legal counsel is an employee of the prosecutor's office or the police department; and (b) whether counsel comes to

82 Such an arrangement would parallel the in-service training arrangements that exist in most prosecutors' offices for breaking in new prosecutors.

the scene; or only gives advice by phone or at his office; or is stationed in the police department. The arrangement with the maximum benefits is where counsel is an experienced prosecutor who comes to the scene of the crime or the arrest (or interrogation). Of course, this is also the most expensive arrangement. Therefore, it is usually only used for the most serious crimes.

This arrangement, in effect, comes very close to being the "ideal" communication system we have described as the model which criminal justice systems must strive to achieve. It brings a decision maker (an experienced prosecutor) who best knows what the ultimate decision maker (probably another prosecutor) needs to know closest to the best source of information (the original crime or arrest scene). But it also has some potential drawbacks. For one thing there is the danger that the prosecutor will lose his legally recognized quasi-judicial status with its legal immunities. He may be regarded at law as acting in a law enforcement capacity. Secondly, he may become a witness in the case and therefore become unable to prosecute it. Also, this possibility of his being called as a witness could create scheduling problems. Thirdly, he may overstep the line between being an adviser and taking command of the investigation. This in turn could offend the police. Even if he does not try to take command, his directions, questions and suggestions may cause resentment among the police. This set of problems is a danger whether or not the prosecutor responds to the field or is in contact by phone.

Our observations in jurisdictions with prosecutor on-call

and roll-out programs indicate that on balance the benefits outweigh the deficits. The problem of prosecutors losing their quasi-judicial status may be continuing potential danger but it has not yet become a problem in the field; nor has there been a problem of prosecutors being called as witnesses in their own cases. On the other hand, there have been problems with both police and prosecutors overstepping their roles and offending representatives of the other agency. Also, the police have reacted with resentment to the presence of prosecutors in squad cars and to prosecutors asking questions and giving directions at crime scenes. But, in both cases, more good will than bad was generated; the quality of the investigation in the particular cases was improved; and the long-term relationship between police and prosecutors was enhanced.

Illustration #10.10

> In Nashville/Davidson County, Tennessee, as part of the ICAP program there, law students and young lawyers were hired to ride with the police and give on-the-spot legal advice. Initially, the police resented their presence and took the attitude, "who are you to tell me what needs to be done." But, within a few months the police came to know the "field advisers" personally and not only accepted their advice when it was given but even sought it out in advance of taking action in other cases.

e. Controlling Follow-Up Investigations

Information that is needed for the prosecution but is not gotten at the crime or arrest scenes must be obtained from follow-up investigations. In the division of labor within the police and between police and prosecutors, there are three meanings to the notion of follow-up investigations. First, there

is the follow-up work done by detectives after receiving cases from the patrol. Second, in jurisdictions where prosecutors' offices have some form of early case screening, there is the follow-up investigation requested by the prosecutor doing the case screening. Thirdly, there is the follow-up investigation done in connection with the final preparation for trial--which typically occurs several months after the case has been in the system.

The primary responsibility for assuring adequate preliminary and early follow-up work lies with the police. If they do not do it right it probably will not get done. By the time the prosecutor gets into the case the evidence may have disappeared or evaporated.

The follow-up investigative work done within the police varies considerably among departments. In some jurisdictions neither the detective division nor the uniformed patrol do any follow-up investigative work on arrests made by the patrol. In others all arrests are routed through the detective division, but the "follow-up" investigation is nothing more than typing the police report for the patrol officer. In still others the detective division handles all cases and for some of them does some follow-up work, such as telephone inquiries, re-interviews of witnesses, and other field work.

Illustration #10.11

> Jurisdiction 7, a large urban jurisdiction, does not assign its felony arrests made by patrol to the detective division for follow-up investigation. No further investigation of these cases will be done until and unless several months later when a prosecutor gets the case he requests further follow-up work. This police

department has had the philosophy that every officer works on his own case. Thus, the only cases which have follow-up work done on them are the cases in which the arrest was initiated by the detective himself. A former inspector in the department estimated that detectives there spent less than 1% of their daily work on follow-up investigation.

Illustration #10.12

In jurisdiction 8, all felony arrests are processed through the detective division. But this simply means that the detectives type up the case files for the arresting officer. Detectives in that jurisdiction estimate they spend 80% of their time typing reports. Little in the way of adding additional information to the case is done in this process.

In jurisdiction 3, 10, and 12, the detective divisions review cases referred to them by the patrol and do follow-up investigation including both telephone contacts, field work, and re-interviewing of witnesses.

Whatever the arrangement regarding follow-up investigation is within the police department, the common complaint of prosecutors is that it is difficult, if not impossible, to get the police (patrol or detective) to do follow-up investigation, especially after the case has been officially transferred either to the court or the prosecutor's jurisdiction. This complaint actually constitutes the major part of the prosecutor's complaint that the police are too arrest-oriented. Once the case becomes an official police statistic either in the form of a case filed in court or cleared by arrest, the police interest in it drops off dramatically. In some jurisdictions this drop-off is less pronounced in cases involving serious crimes. But in other, high-volume jurisdictions it is true even for the serious crimes.

Illustration #10.13

A senior prosecutor in jurisdiction 7 reported that even in homicide cases as soon as the investigator

finds the first witness he brings the case over, gets it charged, and moves on the next case.

Illustration #10.14

A senior prosecutor in jurisdiction 16 reported that in the neighboring city jurisdiction where she previously worked if a prosecutor had asked a police officer to do any follow-up work, "the cop would have told the prosecutor to drop dead."

The problem of getting police follow-up occurs not only in connection with cases where arrests have been made but also in connection with arrest warrants. Getting the warrant issued is an end in itself for the police in some jurisdictions. It represents an officially acceptable category of case disposition. The case wasn't just "closed." A warrant was issued!

Prosecutors control and direct police follow-up investigations in several ways. One strategy is to simply withold the statistical carrot until the job is done.

Illustration #10.15

In jurisdiction 16 the prosecutor's office discovered that it had power over the police which it had not created but was nonetheless willing to use. At some earlier time, the local police department had adopted a policy of regarding the case as being "cleared" only if the prosecutor's office signed off on the case. Once the prosecutors realized this they found that they could get follow-up work done by simply refusing to sign-off on the case.

Illustration #10.16

In his study of the charging practice of prosecutors in Alaska, Ring (1979) reports that prosecutors there also use the tactic of holding off filing a complaint as a form of leverage to get the follow-up investigation done. However, the prosecutors feared that by doing so they were losing some legitimate cases because there was a risk that the police would not bother to do the follow-up work.

Similarly, with regard to police requests for arrest warrants, the prosecutors would wave the carrot in front of the police. They would request that further investigation be done into some essential element of the case before they would issue the warrant. In some cases they knew "full well that the officer would not return again to the office with the case." Ring reports that in general Alaskan prosecutors found that getting follow-up investigations from the police was difficult.

Illustration #10.17

In jurisdiction 7, the prosecutor's office flatly refuses to issue arrest warrants because the police had piled up thousands of them, which, in the opinion of the prosecutor's office, they never intended to execute. The prosecutor's office was in effect refusing to allow the police to play statistical games with arrest warrants. The local police, however, did not understand what his purpose was and resented the practice, interpreting it as an example of prosecutorial arrogance and stubborness. One of the negative consequences of the tactic was that the police could no longer get cases listed in the national criminal information system operated by the FBI. Therefore if the suspect were apprehended in connection with some other offense, he would escape the efforts of the police to locate him in connection with the other prior case.

The prosecutor can only use the carrot technique in jurisdictions where his office reviews the case at an early point in the charging process. The most strategic position is a review before the case has been initially filed in court. The second best position is a review within three to ten days of arrest and at a point in the process where the prosecutor may still refuse charges (i.e., he does not regard himself as bound legally or politically or administratively by the findings of a probable cause hearing). A review at any later point would be largely worthless both from the point of view of trying to get evidence while it is still fresh and trying to motivate police with the

carrot of having the case charged.

Illustration #10.18

In jurisdiction 6 the prosecutor found that once the police filed a case in court it was difficult to get the police to do follow-up work. Thus he restructured the initial filing process and required that all police cases be reviewed by his office before they could be filed in court. Having made this arrangement, he also used the tactic of refusing to approve cases until all of the obvious follow-up work that was needed to be done was done. At first the police resisted this tactic. But subsequently they adjusted to it and learned to call the prosecutor's office and see if he would accept a case before bothering to drive over to the county seat.

Assuming the prosecutor has an early case review procedure, there are other limitations on the carrot strategy. Sometimes the carrot may not be big enough. Prosecutors report that is especially difficult to get police follow-up investigation done in minor cases. Rather than chasing down more information (especially at the end of a tour of duty), the police would rather that the prosecutor just accept the case and "see what he can get." In addition it would be politically risky for prosecutors to continually reject cases where probable cause exists but some additional case-strengthening work needs to be done.

For these reasons police and prosecutors in some jurisdictions have either supplemented the carrot with the stick or relied on a stick strategy alone. One form of the stick is a ranking police officer--preferably with a reputation for orneriness--who is assigned to the job "of police-prosecutor liaison" or "police-court liaison" or "case courier." All prosecutorial requests for follow-up work are referred to him and he makes sure they get done.

Illustration #10.19

In Nashville/Davidson, Tennessee, a prosecutor familiar with the project there to improve the quality of cases delivered to the prosecutor's office reported that getting case follow-up was a problem especially in minor cases. The project there experimented with a variety of ways of running their project but in the end found that "you have to have someone who can kick their asses and tell them to get the hell back out there on the street and get the information."[83]

Illustration #10.20

In jurisdiction 12, as part of an ICAP program, all cases are transferred from the police to the prosecutor by a sergeant who goes over the cases with a prosecutor. He brings back requests from the prosecutor for follow-up investigations. He notifies the officers in charge of the respective cases of the prosecutor's requests and gives them each a specific date by which time the work is to be done.

The sergeant then places the request on an index card and files it in a box sorted by cards labeled from 1 to 31. The request card is filed according to the day of the coming month when the follow-up work is due. Thus, for example, on the 15th day of the month the sergeant will pull all cases which had follow-up work due on that day. He will determine if the work has been done and will deliver it to the prosecutor. If the work has not been done, he sees that it is done and, in appropriate cases, can institute negative sanction against the responsible police officer.

Part of the follow-up problem is related to the "scheduling" and "accessability" problems complained about by the police and prosecutors. In some jurisdictions prosecutors complain that (a) they do not know who is in charge of a case; or (b) who they should call to find out either who is in charge; or (c) how to

83 Telephone interview with anonymous assistant prosecutor, Metropolitan Nashville/Davidson, Tennessee, October 1, 1980.

get follow-up work done; or (d) when they call the officer they want is not working the day shift and cannot be reached. One of the additional advantages of the case courier system described in Illustration #10.20 is that it solves these problems. The courier officer becomes the contact man to whom prosecutors can refer all requests and who becomes responsible for contacting officers working night and weekend shifts.

In jurisdictions where the police bring cases over to the prosecutor's office themselves an alternative strategy for assuring investigative follow-up is being used. It consists of having the officer in charge of the case sign a follow-up list of things to be done.

Illustration #10.21

In Washington, D.C., the prosecutors review cases individually with the arresting police officers before the cases are initially filed in court. In misdemeanor cases this conference will serve both as an initial charging as well as a trial preparation discussion. It is the only meeting the police and prosecutor will have before the case goes to trial or is plea bargained out. The next time the case is in court will be for trial and it will be handled by a different prosecutor. He will have a stack of 20 or more other cases to dispose of the same day. If follow-up investigation is needed, then either the police get it done or it is not done at all.

To assure that the follow-up investigation does get done the prosecutor's office developed a form on which the prosecutor lists the specific things to be done in the follow-up e.g., "witness A is to be re-interviewed to determine is she saw the gun."

The list is made out as the prosecutor interviews the police officer about the case and fills out the prosecutor's file. When finished, the form is signed by the police officer as well as the prosecutor. One copy is given to the officer. The other is placed in the prosecutor's file. On the day of trial the new prosecutor will know what done and will be able to hold this officer accountable if the case is weakened or

lost because of a failure to conduct the agreed upon follow-up work.

In still other jurisdictions without the case courier or the signed follow-up sheet systems, the prosecutors have either become accustom to not asking police to do case follow-up or they come to rely upon informal social relationships which they develop with police officers in order to assure follow-up. If they can get to know the detective personally and/or they work with him regularly, then they can ask for follow-up and expect to get it. But this informal system has its drawbacks. Because it relies upon social ties, it is inconsistent. Some prosecutors get some police officers to follow-up cases some of the time. With staff turnover the system breaks down. Furthermore, without formal recognition of the importance and legitimacy of these requests, police officers sometimes get caught in competing loyalties and priorities. Situations arise where they have to choose between doing follow-up work for a prosecutor or doing something that the officer's superior wants done.

4. Personal Factors

a. The Police Understanding of Prosecution Information Needs: The Decision Simulation Study

1. A Theory

One possible explanation for the failure of the police to obtain (and transmit) as much information as the prosecutor needs runs somewhat contrary to conventional wisdom. It may be that the police know what the general categories of information the prosecutor needs but fail to appreciate the amount of information

the prosecutor needs. This possibility was explored through the use of our decision simulation methodology. The results support the conclusion that the police do know the general categories of information needed by prosecutors but significant by underestimating the amount of information prosecutors feel they need in order to decide what to do with the same case.

Police officers were told[84] to imagine they were senior officers in a hypothetical jurisdiction[85] and were being asked by a junior officer for advice about what to recommend to a prosecutor in a robbery case. He could recommend that the case be not charged, or charged and taken to trial, or charged and plea bargained. If the recommendation was to plea bargain it, the officer also had to give advice as to the terms of the plea bargain. In order to advise his hypothetical junior colleague, the officer was free to learn more about the case by selecting items of information from a folder containing 44 index cards arranged so that the title of the item of information showed at the bottom of the card (e.g., "Defendant's prior record and police reputation") but the actual substance of the information could not be seen unless the officer selected that card and read the hidden information.

The officer could select as many items of information as he wanted. The number of items; their rank order of selection; and

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84 For sampling information see Part I, Chapter 1.

85 For a description of the characteristics of the hypothetical jurisdiction see Appendix G. For a description of the specific items of information in the case see Appendix H.

their specific content were recorded and analyzed. The same simulation was conducted with prosecutors.[86] The analysis presented here focuses only on the degree of agreement between police and prosecutors regarding how many items of information are chosen; what items are chosen; and in what rank order.[87] Four hypotheses based on our interviews and the literature were developed.[88]

2. Hypotheses

Given the fact that prosecutors complain that they do not get enough information from the police and the fact that the police seem to think the prosecutor could go to trial more often with the information he has, it seemed reasonable to hypothesize that:

H1: The police would select significantly fewer items of information than prosecutors before making their decisions.

Given our previous findings regarding how much time and

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86 In the simulation with prosecutors, they, of course, were told to imagine that they were senior prosecutors advising junior prosecutors. This data were obtained in the course of our plea bargaining study and was simply subjected to secondary analysis for the purpose of the present study. For comparisons between prosecutors and defense attorneys decisions using these same cases see McDonald, et. al., 1979.

87 Comparisons between police and prosecutors regarding their outcome decisions after consulting the information are presented in Part II, Chapter 3 of this report.

88 There is a substantial literature on factors affecting the prosecutor's charging and plea bargaining decisions (see our review of this in Part IV, Chapter 9.) But we were only able to find three studies on police decisions making regarding the charging decision and none regarding plea bargaining (see Siegel, et. al., 1974; Littrell, 1974; and Battelle Memorial Institute, 1977a).

(Footnote continued)

experience it takes to learn how to "evaluate" cases and determine what their appropriate dispositions should be (see McDonald, et. al., 1979) and given that the police have less experience in evaluating cases than prosecutors, it was hypothesized that:

H2: Prosecutors would vary less among themselves than police would among themselves regarding the number of items selected before making their decisions.

Given the widespread police complaints that prosecutors are too lenient, too willing to drop cases or plea bargain them, and too obstructionist, it seemed reasonable that this may be reflected in differences between police and prosecutors in the items of information that they would regard as most important in determining what decisions to make. One way of measuring this would be to compare the relative frequencies with which specific items of information are consulted by the two groups before making their decisions.[89] It was hypothesized that:

H3: There would be a difference between police and prosecutors in the relative frequency with which items of information would be consulted before making their decisions.

Note that we did not try to predict which specific items of information would be picked more or less often by police and

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89 Of course, we recognize that by itself the frequency of consulting an item of information is not conclusive proof of the importance attached to the item. Police and prosecutors could in theory consult an item with equal frequency but attach different weights to that item and thus reach different conclusions. Our methodology does not allow for an analysis of that possibility.

prosecutors. However, the police complaint that their opinions are not taken into sufficient account by prosecutors would lead one to expect that the item labeled, "Defendant's prior record and reputation" as well as the item labeled, "Police attitude toward proposed bargain" would be chosen more frequently by the police than by prosecutors. Also, given the police complaint that prosecutors do not care enough about victims, and the related police belief that they (the police) are the defenders, advocates, and representatives of victims, one would expect the police to consult the item labeled, "Victim's attitude toward bargain" more often then prosecutors. In addition, the police complain about prosecutors being too lenient and not giving defendants what they deserve, would suggest indirectly that the police would be less likely than prosecutors to select information relevant to a rehabilitative as opposed to a retributive theory of sentencing. Thus, the police would be less likely to consult information about the defendant's social, psychological or employment histories.

The fourth hypothesis is related to the third. It is another way of measuring the importance attached to specific items of information. Here the measure is not simply the relative frequency with which an item is chosen but the rank order in which it is chosen. It was hypothesized that:

H4: Police would pick items in a different rank order than prosecutors before making their decisions.

Again, as in hypothesis 3, we do not try to predict the direction of the difference. But, for all the reasons mentioned

in connection with hypothesis 3, one would expect that those items which the police would rank more highly than the prosecutors would be reflected in a higher rank order of those items in the police selection pattern than in that of the prosecutors.

3. Findings

The findings of the analysis of the simulation data are mixed. The hypothesis that the police would consult fewer items of information than prosecutors was strongly confirmed. Prosecutors chose on an average 12.9 items of information compared to only 9.2 items for police. The hpothesis that there would be greater consensus as to the number of items chosen among prosecutors than there would be among police officers was not supported. The coefficient of variation was virtually identical for police (0.478) and prosecutors (0.473). The hypothesis that police and prosecutors would differ in the frequency with which they selected specific items was confirmed in some respects and disconfirmed in others. If one simply looks at the difference in the percentages of police and prosecutors selecting specific items of information one fines many differences of fairly substantial amounts (see Table 10.1). For example, 97.1% of prosecutors compared to only 82.#% of police consulted the item, "Basic facts of the case." However, if one rank orders the items according to the frequency with which prosecutors consulted them and compares this rank order with the rank order for the police, one finds a statistically significant, very strong positive relationship between them (Spearman's Rho [RS] = +.73).90 Thus, overall, there is more agreement than disagreement between police

Table 10.1

FREQUENCY WITH WHICH UNITS OF INFORMATION WERE CHOSEN BY PROSECUTORS AND POLICE

Unit of Information	No. of Prosecutors Choosing Item (N=138)	Percent of Pros. Choosing Item	No. of Police Choosing Item (N=62)	Percent of Police Choosing Item
Basic facts of case	134	97.1	51	82.3
Defendant's prior record & reputation	130	92.2	48	77.4
Evidence --substance of available	126	91.3	48	77.4
Aggravating & mitigating circumstances of the offense	105	76.1	40	64.5
Defendant's account of incident	105	76.1	42	67.7
Effectiveness of witnesses at trial	101	73.2	27	43.5
Victim's account of incident	100	72.5	41	66.1
Victim characteristics	67	48.6	13	21.0
Defendant's age	62	44.9	21	33.9
Victim's attitude toward bargain	59	42.8	12	19.4
Police attitude toward bargain	54	39.1	6	9.7
Defendant's psychiatric problems	49	35.5	14	22.6
Drug use	49	35.5	17	27.4
Propriety of police conduct after arrest	47	34.1	15	24.2
Codefendants	45	32.6	8	12.9
Trial judge's reputation for leniency	40	29.0	11	17.7
Defendant's employment status	38	27.5	11	17.7
Pretrial release, probation, parole status at time of offense	36	26.1	18	29.0
Defendant's intelligence & education	34	24.6	10	16.1
Alcohol use	32	23.2	9	14.5
Length of time since arrest in instant case	30	21.7	18	29.0

Rs = .73

P > .001

PART V:

APPENDICES

and prosecutors on the relative importance of specific items of information. Hence, our hypothesis in this regard is better thought of as being disconfirmed and confirmed. In other words, the police agree with the porsecutors regarding the relative importance of certain items of information, at least as measured by this technique.

In addition, there are several unexpected and inexplicable findings in Table 10.1. Our expectation that the police would consult the item, "Defendant's prior record and reputation," more frequently than prosecutors was not met (only 77.4% of police compared to 92.2% of prosecutors consulted it). Our expectation that police would consult the item, "Police attitude toward proposed bargain," more often than prosecutors was dramatically wrong. (Only 9.7% of police compared to 39.1% of prosecutors consulted it.) Another big surprise was the dramatic extent to which our expectation that police would consult the item, "Victim's attitude toward bargain," more often than prosecutors was wrong. (Only 19.4% of police compared to 42.8% of prosecutors consulted it.) However, our expectation that the police would be less likely to look at information related to rehabilitative as to retributive dispositions was confirmed. (See differences between police and prosecutors on items regarding defendant's alcohol use, intelligence and education,

90 Spearman's Rho is a statistical test for measuring the degree of agreement between two groups in their rank order in along some dimension. The highest positive correlation is indicated by RS = +1.00 and the lowest is 0.00. Our findings of RS = +.73 is considered a very strong correlation.

employment status, and psychiatric history.)

The hypothesis that police and prosecutors would differ in the relative importance of items as indicated by the rank order in which they selected those items was also disconfirmed. Comparing police and prosecutors in terms of what item was selected first most frequently, what item was selected second most frequently, and so on, one finds substantial agreement between the two groups (Table 10.2). For the first ten positions in the rank order of selection, the items chosen most frequently for each position was virtually identical for police and prosecutors. For example, the item that was chosen most frequently by both groups as the first item selected was, "Basic facts of the case."

4. Conclusions From the Simulation

These findings suggest that the communication breakdown between police and prosecutors regarding the supplying of information is not due to a fundamental difference between them in their understanding of what <u>general categories of information</u> are relevant to prosecutorial decision making.91 The police picked the same general categories of information (e.g., prior record and reputation, basic facts of the case) in the same rank order of importance and in the same rank order of frequency as

91 Because the police subjects in this simulation were primarily obtained at a national conference, the generalizability of these results to all police is open to some discussion. It may be that patrol officers and new recruits would be less able to have made the decisions that were made by the respondents to this simulation.

Table 10.2

A COMPARISON OF THE RANK ORDERS OF ITEMS OF INFORMATION SELECTED BY POLICE AND PROSECUTORS (IN PERCENTAGES OF THE MOST FREQUENTLY SELECTED ITEM IN EACH RANK ORDER POSITION)

% of Police selecting item in this rank	Item most frequently selected by police in this rank ordered position (N = 62)	Rank ordered positions	Item most frequently selected by prosecutors in this rank ordered position (N = 138)	% of prosecutors selecting item in this rank
66.1	Basic facts of the case	FIRST	Basic facts of the case	77.9
30.6	Evidence--substance of available	SECOND	Evidence--Substance of available	43.4
14.5	Defendant's account of incident	THIRD	Defendant's account of incident	19.9
17.7	Victim's account of incident	FOURTH	Defendant's account of incident	14.7
		FOURTH	Defendant's prior record & reputation	14.7
		FOURTH	Effectiveness of witnesses at trial	13.9
		FOURTH	Victim's account of incident	13.2
9.7	Defendant's prior record & reputation	FIFTH	Defendant's prior record & reputation	14.7
		FIFTH	Effectiveness of witnesses at trial	10.3
8.1	Defendant's prior record & reputation	SIXTH	Defendant's account of incident	9.5
8.1	Defendant's account of incident	SIXTH		
8.1	Effectiveness of witnesses at trial	SIXTH		
8.1	Defendant's prior record & reputation	SEVENTH	Effectiveness of witnesses at trial	8.1
8.1	Aggravating & mitigating circumstances of the offense	SEVENTH	Victim characteristics	6.6

Table 10.2

% of Police selecting item in this rank	Item most frequently selected by police in this rank ordered position (N = 62)	Rank ordered positions	Item most frequently selected by prosecutors in this rank ordered position (N = 138)	% of prosecutors selecting item in this rank
8.1	Effectiveness of witnesses at trial	EIGHTH	Defendant's prior record & reputation	9.5
		EIGHTH	Aggravating & mitigating circumstances of the offense	8.0
		EIGHTH	Effectiveness of witnesses at trial	6.5
4.8	Aggravating & mitigating circumstances of the offense	NINTH	Aggravating & mitigating circumstances of the offense	8.7
		NINTH	Victim characteristics	5.1
		NINTH	Defendant's age	5.1
		NINTH	Defendant's prior record & reputation	5.1
4.8	Victim's attitude toward bargain	TENTH	Aggravating & mitigating circumstances of the offense	5.1
4.8	Drug use	TENTH	Defendant's intelligence & education	3.6
		TENTH	Defendant's employment status	3.6
		TENTH	Effectiveness of witnesses at trial	3.6
		TENTH	Victim's attitude toward bargain	3.6
		TENTH	Drug use	3.6

Table 10.2

% of Police selecting item in this rank	Item most frequently selected by police in this rank ordered position (N = 62)	Rank ordered positions	Item most frequently selected by prosecutors in this rank ordered position (N = 138)	% of prosecutors selecting item in this rank
3.2	Defendant's Prior record & reputation	ELEVENTH	Defendant's psychiatric problems	7.4
3.2	Pretrial release, probation & parole status at time of offense	ELEVENTH		
3.2	Drug use	ELEVENTH		
3.2	Length of time since arrest in instant case	ELEVENTH		
3.2	Evidence--substance of available	TWELFTH	Defendant's psychiatric problems	4.3
		TWELFTH	Police attitude toward proposed bargain	4.3
3.2	Trial judge's reputation for leniency	THIRTEENTH	Drug use	4.3
		FOURTEENTH	Defendant's psychiatric problems	5.1
		FOURTEENTH	Alcohol use	2.9
		FIFTEENTH	Defendant's employment status	2.2
		FIFTEENTH	Defendant's interests & activities	2.2
		SIXTEENTH	Trial judge's reputation for leniency	3.6
		SEVENTEENTH	Defendant's age	2.2
		SEVENTEENTH	Trial judge's reputation for leniency	2.2
		SEVENTEENTH	Available alternatives to incarceration	2.2

Table 10.2

% of Police selecting item in this rank	Item most frequently selected by police in this rank ordered position (N = 62)	Rank ordered positions	Item most frequently selected by prosecutors in this rank ordered position (N = 138)	% of prosecutors selecting item in this rank
		SEVENTEENTH	Police attitude toward proposed bargain	2.2
		SEVENTEENTH	Length of local residence	2.2
		EIGHTEENTH	Defendant's interests & activities	2.2
		NINTEENTH	Drug use	3.6

prosecutors. But, there is a fundamental difference between police and prosecutors in regard to how much information is needed for prosecutorial decisions. On the average prosecutors felt they needed four more units of information than the police before they could reach their decision. In addition, with regard to specific items of information the police differed from prosecutors. The police were less likely to be concerned than prosecutors with the police attitude towards the proposed plea bargain, the victim's attitude towards the plea bargain, and the personal characteristics of the defendant related to possible disposition decisions that would contemplate rehabilitation as opposed to retribution.

b. Differential Police Conviction Productivity

The matter of police knowledge, skill and motivation to get and transmit information needed by the prosecutor was raised in a special way by (Forst, et. al., (1977) who found substantial differences among individual police officers in their conviction productivity. In 1974, 54% of the members of the Metropolitan Police Department of Washington, D.C. made at least one arrest. Of those making arrests, 31% had no convictions. Of the arrests that did end in conviction over one-half were made by as few as 15% of the officers who made arrests. Over half of the felony offenses that resulted in conviction were made by 10% of the officers making arrests.

Several hypotheses could explain the differences among police officers in their conviction rates. (a) Officers with

higher conviction rates may have somehow either learned what the prosecutor needs to know better than other officers; or (b) they may not have known any more about how to get information but knew better how to transmit it; or (c) they simply may have worked harder; or (d) they may have defined their role as ending in conviction instead of the traditional view of the police role as ending with arrest; or (e) the findings of the Forst study could have been an artifact of the way in which cases are assigned among police officers. The officers with the higher conviction rate may simply have been getting cases which were easier to convict.

In connection with our interest in the question of whether the police have the knowledge, skill and motivation to supply prosecutors with necessary information, we pursued these hypotheses in the field. We asked command-level police and supervisory-level prosecutors if they could identify individual officers who regularly made exceptionally strong or weak cases, and whether they could identify special skills (or lack of them) that these officers possessed. Both police and prosecutors usually could identify such individuals. With regard to the officer with low rates of conviction prosecutors frequently mentioned the matter of the officer's individual reputation for credibility. In virtually every jurisdiction, no matter how large, prosecutors, judges, regular defense counsel and other police officers learn about the individual reputations for honesty of the other actors in the system, especially the police officers. Once an officer has been caught stretching the truth

of making up non-existent details in a case, the word spreads and all of his cases are subsequently weakened.

Numerous anecdotes of this kind were related to us. We were told that nobody including the judges trusts the testimony and investigative reports of certain police officers. In some cases this extended to entire police divisions or police departments. Their cases may not be flatly rejected by prosecutors but "adjustments" are made. They are the cases that prosecutors would not want to go the limit for any may have to lose something in plea bargaining. The individual officer's reputation for dishonesty is sometimes brought up in plea negotiations by defense counsel as part of the effort to discredit the strength of the state's case. Some prosecutors reported that they would never put certain police on the witness stand because they know they would lie. Ironically, prosecutors also reported that they would not put certain honest officers on the stand because they "just look like liars."

Illustration #10.22

In jurisdiction 12 the fact that police reputations die hard presented a major problem in the relationship between police and prosecutors because of an individual case. An officer developed a reputation for doing shoddy work and filling in the details of cases "on the typewriter." When word about this reached his chief, the chief had the officer sent back to training academy

and retrained. However, when the officer returned to duty the local prosecutors continued to distrust his cases and did what they could to avoid prosecuting them. At that point the problem turned into a confrontation between the chief of police and the prosecutors because the chief had done the only thing he could do short of firing the officer. He demanded that the prosecutors give the officer a second chance.

With regard to the characteristics of officers who make exceptionally strong cases, prosecutors usually identify two things, motivation and ability to anticipate the needs of the prosecutors. Motivation was the key factor. Both prosecutors and police frequently attributed conviction differentials to motivation differentials. Some police officers simply have greater tenacity in investigations and are willing to check out more leads than others. The ability of these officers to anticipate the needs of the prosecutors was not necessarily due to special knowledge or skill but simply to tenaciousness.

With regard to special skills we asked if officers who were more successful at getting convictions were ones who were better able to express themselves in writing. The answers were "yes in general" but "not necessarily."

Illustration #10.23

In jurisdiction 10, the captain of detectives reported that his "best detective" can barely express himself in writing. "He can't even read his own notes. But he's dynamite on the witness stand and he knows how to put a case together."

Command-level police officers tended to explain differential

conviction productivity either in terms of differential motivation or in terms of differential case assignment.

Illustration #10.24

> The same captain of detectives in jurisdiction 10 said he thought the reason for Forst's findings were "obvious." They were the results of differential case assignment. He says he always assigns his "best" cases to his best detectives. He gives the "crap" cases--the ones he know either cannot be solved or not result in convictions--to either his inexperienced detectives to cut their teeth on or to his incompetent detectives to "keep them from screwing up the good cases."

C. Summary and Conclusions

The police failure to "get" the information needed by the prosecutor refers to (a) a failure to locate original sources, (b) failure to recognize the evidentiary value of information they have located, and (c) failure to manipulate potential sources of information to obtain more information. One of the fundamental reasons for these failures is the police definition of their role as ending with arrests. Contributing to the continuation of that overly constricted definition of the police role is the extensive use of plea bargaining by prosecutors coupled with their failure to supply the police with feedback so that they can see the impact of their inadequate investigative efforts on case disposition; learn from their mistakes; and establish performance measures related to case disposition. The failure to get information is not due to a fundamental disagreement or misunderstanding between police and prosecutors as to what general categories of information are needed to make prosecutorial decisions. It is related to the level of effort by

individual officers and to the general misinterpretation of the police that prosecutorial decisions can be made on less information than prosecutors in fact feel they need. If the police had a greater appreciation of the phenomenon of fact negotiation they would recognize the significance of this need for greater information.

The organization of police work and the location in the criminal justice process of the prosecutorial case review substantially affect the quality of information discovered. In general, it is difficult to get police to do full investigations after a case has been either accepted by the prosecutor or filed in court. This can be remedied in jurisdictions which can afford to have early case review by a prosecutor.

In general, the best evidence is at the scenes of the crime and the arrest but, the police officer who usually reaches those scenes first is the officer with the least knowledge of what it is the prosecutor needs to know. Programs exist in some departments for getting the police officer with the greatest skills to the scenes of the crime and arrest where the best evidence are available.

In general, the quality of information discovered by the police can be increased by: (a) better training for police, (b) increasing the police appreciation of the prosecutor's role and his need for fine detail, (c) early case review by the prosecutor and related mechanisms for controlling follow-up investigations, (d) and an increase in the investigative role of the patrol officer.

Appendix G

CHARACTERISTICS OF SIMULATED JURISDICTION USED IN DECISIONS SIMULATION

(A copy of this may be handed to Respondent in the Plea Bargaining Simulation.)

In this jurisdiction the following conditions prevail:

(1) Prosecutors are permitted to present to the court plea agreements involving charge reductions and dismissals and sentence recommendations.

(2) These agreements are generally followed by the judges.

(4) There are no mandatory sentences for repeat or habitual offenders.

(5) Any motions in a case are heard immediately prior to trial.

(6) No offenses are impeachable convictions.

(7) There is an individual (vs. a master calendar) system of case docketing. Every judge gets and equal share of the caseload and is responsible for disposing of it himself.

(8) There is a 90-day speed trial rule.

(9) There is no youth corrections act.

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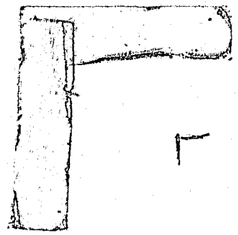

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APPENDIX A

POLICE AUTHORITY TO RELEASE[1]

Jurisdiction	Permitted?	Authority
Alabama	No[2]	None.[2]
Alaska	No	None.
Arizona	Probably not	None; but see McGeorge v. Phoenix, 117 Ariz. 272, 572 (Ct. App.), 572 P.2d 100 (1977)(no statutory duty to arrest or detain)[3].
Arkansas	Possibly yes	Cf. Wilson v. State, 258 Ark. 110, 522 S.W.2d 413, 414, cert. denied, 423 U.S. 1017, 96 S.Ct. 451 (1975); Stepps v. State, 242 Ark. 587, 588, 414 S.W.2d 620, 620 (1967)("directory, not mandatory"), cert. denied, 389 U.S. 1036, 88 S.Ct. 766 (1969).[4]
California	Yes	Cal. Penal Code § 849(b)(West 1970); Op. Att'y Gen. 65(1969)(officer may release person arrested by citizen's arrest).
Colorado	Yes	Colo. Rev. Stat. § 16-3-105(1)(a) (1973)(if no adequate grounds for criminal complaint).
Connecticut	No	None.
Delaware	Yes	Del. Code Ann. tit. 11, § 1908(a)(1) (1975)(if no ground for making criminal complaint).
Dist. of Col.	No	None; D.C. Code Ann. § 4-143 (1973).[3]
Florida	No	None.
Georgia	Probably not	See Peters v. State, 115 Ga. App. 743, 156 S.E.2d 195 (1967)(statutory requirement, that person arrested not brought before officer authorized to issue warrant within 48 hours to be released, interpreted to mean only release until warrant obtained).
Hawaii	Yes	Hawaii Rev. Stat. §§ 803-5, 803-9 (1976) (arrest and detention for examination permitted, but must release if not charged within 48 hours).

APPENDIX A Police Authority to Release (Continued)

Jurisdiction	Permitted?	Authority
Idaho	No	None.
Illinois	Yes	Monroe v. Pape, 221 F.Supp. 635 (D. Ill. 1963); Ill. Ann. Stat. ch. 38, § 107-6 (Smith-Hurd 1970); but see People v. Thomas, 50 Ill.App.3d 398, 365 N.E.2d 717 (1977)(not if there are grounds for criminal complaint).
Indiana	No	Dommer v. Hatcher, 427 F.Supp. 1040 (D. Ind. 1977).[5]
Iowa	No	None.
Kansas	Yes	Kan. Stat. Ann. § 22-2406 (1974).
Kentucky	No	None.
Louisiana	Unclear	Compare La. Code Crim. Pro. Ann. art. 228 (duty of police to promptly book arrested person and keep imprisoned unless released on bail) with art. 230.1 C (person not brought before judge within 72 hours to be "released forthwith")(West 1967).
Maine	Yes	Therriault v. Breton, 114 Me. 137, 141-42, 95 A. 699, 701 (1915)(within police discretion to release for felony, but person arrested for misdemeanor must waive requirement to be brought before magistrate).6,7
Maryland	No	Johnson v. State, 282 Md. 314, 321-23, 384 A.2d 709, 713-14(1978) (alternative holding)(rule that a defendant "shall" be taken without unnecessary delay before a judicial officer is "mandatory," denoting "an imperitive obligation inconsistent with the exercise of discretion").[3]
Massachusetts	Yes	Keefe v. Hart, 213 Mass. 476, 481-82, 100 N.E. 558, 559 (1913); Caffrey v. Drugan, 144 Mass. 294, 296-97, 11 N.E. 96, 97 (1887).6

APPENDIX A Police Authority to Release (Continued)

Jurisdiction	Permitted?	Authority
Michigan	Probably yes	See People v. Hamilton, 359 Mich. 410, 416-17, 102 N.W.2d 738, 472 (1960)(by implication). 7,8
Minnesota	Yes	Minn. R. Crim. P. 4.02.
Mississippi	Probably not	Cf. Harper v. State, 251 Miss. 699, 705, 171 So.2d 129, 131 (1965)(by implication)(sheriff without power to accept waiver of hearing before magistrate).
Missouri	Yes	Mo. Ann. Stat. § 544.170 (Vernon 1953)(person to be released unless charged with a crime within 20 hours; violation by officer a misdemeanor).
Montana	Yes	Mont. Rev. Codes Ann. § 95-610 (Allen Smith 1969).
Nebraska	Probably not	Neb. Rev. Stat. § 29-401 (1975).[3]
Nevada	Probably not	Nev. Rev. Stat. § 171.178 (1975) ("in all cases"). 4
New Hampshire	Yes	N. H. Rev. Stat. Ann. § 594:18-a (Supp. 1973).
New Jersey	No	None.
New Mexico	No	None.
New York	Yes	N. Y. Crim. Proc. Law § 140.20(4) (McKinney 1971).
North Carolina	No	State v. Parker, 75 N.C. 249, 250 (1876)("The constable thus constituted himself the judge, jury and executioner. This is the best description of despotism.").
North Dakota	No	None.
Ohio	No	Oh. Rev. Code Ann. § 2935.03 (Anderson Supp. 1978)[2]; Oh. R. Crim. P. 4(E).

APPENDIX A Police Authority to Release (Continued)

Jurisdiction	Permitted?	Authority
Oklahoma	No	Okla. Stat. Ann. tit. 21, § 534 (West 1958).[4]
Oregon	No	None.
Pennsylvania	Yes	See Comm'r v. Eaddy, 472 Pa. 409, 372 A.2d 759.[7] (1977)
Rhode Island	Yes	R. I. Gen. Laws § 12-7-12 (1970); see also State v. Kilday, 90 R.I. 91, 155 A.2d 336 (1959)(discretion of officer).
South Carolina	Probably not	Cf. Westbrook v. Hutchison, 195 S.C. 101, 112, 10 S.E.2d 145, 149 (1940) (private person may not release from citizen's arrest).
South Dakota	No	None.
Tennessee	Yes	Hardin v. State, 210 Tenn. 105, 134, 355 S.W.2d 105, 113 (1961); East v. State, 197 Tenn. 644, 648, 277 S.W.2d 361, 363 (1955); Wynn v. State, 181 Tenn. 325, 331, 181 S.W.2d 332, 334 (1944).[7,8]
Texas	Possibly yes	Osoba v. Wilson (Tex. Civ. App.) 56 S.W.2d 937, 940 (1933)(by implication)[6]; but see Ex parte Garcia (Tex. Crim. App.) 547 S.W.2d 271, 274 (1977)[8]; Tex. Crim. Pro. Code Ann. arts. 2.13,[3] 14.06[3] (Vernon 1977).
Utah	No	Utah Code Ann. § 77-13-17.[4]
Vermont	No	Vt. R. Crim. P. 3(b).
Virginia	No	See Va. Code § 19.2-82 (Michie 1975).
Washington	No	None.
West Virginia	No	None.
Wisconsin	Yes	Peloquin v. Hibner, 231 Wis. 77, 86-87, 285 N.W. 380, 385 (1939)[7]; Wis. Stat. Ann. § 968.08 (West 1971).
Wyoming	No	None.

APPENDIX A Police Authority to Resease (Continued)

Notes

[1]None of the jurisdictions permit police to release a person arrested under a warrant, thus the table deals only with arrests without warrant.

The existence of statutory provision for temporary investigatory stops arguably could evidence an intent to restrict police discretion by allowing them to stop persons temporarily for brief questioning when grounds for arrest are not immediately clear; but when an arrest is made following such questioning, sufficient ground should then exist and require independent verification by a magistrate. Although some states have such provisions, the issue has not received judicial consideration, and are not reflected herein.

[2]The response, "no" "none" means that no support was found which would argue for allowing release; though in many cases support could be cited for arguing it would not be allowed. Most often it would turn on as interpreting "may" or "shall" in statutes defijing arrest powers and procedures after arrest -- not much of an argument and probably my conclusion would be without basis in state law (were it to be considered by a court, I would be as likely to be wrong as to be right). So I just put "none" to show no affirmative support.

[3]Explicit statutory provision on the duty of the police to arrest or detain might be seen as evidence of an intent to restrict police discretion, especially if coupled with a penalty for failure.

[4]Consistent use of words such as "may," "shall," "must," "any" or "every" permit an interpretation of statutory provisions on arrest and bringing an arrested person before a magistrate as "mandatory" or "directory," especially if coupled with a penalty for failure.

[5]Some courts, looking to an arrest standard of probable cause, are not willing to permit release. If there are no grounds for arrest, the person should not have been arrested. Police should not be allowed to hold persons after arrest to develop grounds to validate a prior arrest.

[6]The willingness of a court to allow release may be expressed in terms of recognizing an arrested person's right to waive the obligation of the police to take him before a magistrate.

[7]Release might be allowed because the court recognizes the possibility that what first appeared to the police to constitute adequate grounds for arrest later disappeared.

[8]Although the police are required to take the person arrested before a magistrate, release after arrest may not be inconsistent with the purpose of such requirement to protect against undesirable police practices (e.g. coerced confession) because no trial follows.

Appendix B

RELEASE AFTER ARREST BY POLICE, BY POLICE AND PROSECUTOR ESTIMATES OF FREQUENCY OF USE AND BY LEGAL AUTHORITY. (POLICE AND PROSECUTOR ESTIMATES BASED ON RESPONSE TO THE TELEPHONE SURVEY QUESTION: "DO THE POLICE RELEASE DEFENDANTS AFTER ARREST WITHOUT REFERRING THE CASES TO THE PROSECUTOR'S OFFICE? YES, NO, IF YES, HOW OFTEN WOULD YOU SAY THIS OCCURS?")

Appendix B (Continued)

JURISDICTION	POLICE ESTIMATES	PROSECUTOR[1] ESTIMATES	POLICE RELEASE AUTHORIZED BY LAW?[2] YES/NO/ UNCLEAR	LEGAL AUTHORITY FOR POLICE RELEASE
CALIFORNIA				
San Bernadino	No	Yes - 3-6%	YES	Cal. Penal Code§ 849(b)(West 1 Op.Att'y Gen. 65(1969)(Officer may release person arrested by citizen's arrest).
San Francisco	Can be done	May in some instances	YES	SAME AS ABOVE
Alameda Co./Oakland	Yes, not freq.	Yes - 10%	YES	SAME AS ABOVE
Santa Clara	Yes, not freq.	Only for misd.	YES	SAME AS ABOVE
Riverside	Yes, not freq.	Yes	YES	SAME AS ABOVE
COLORADO				
Jefferson	No response	No response	YES	Colo. Rev. Stat.§ 16-3-105(1)((1973) (if no adequate grounds for criminal complaint).
CONNECTICUT				
Litchfield	No	Yes	NO	NO AFFIRMATIVE SUPPORT[3]
FLORIDA				
Palm Beach	No	No	NO	NO AFFIRMATIVE SUPPORT
GEORGIA				
Muscogee/Columbus	Yes, not freq.	No	PROBABLY NOT[4]	See Peters v. State, 115 GA. A 743, 156 S.E. 2d 195 (1967) (statutory requirement, that p son arrested brought before of icer authorized to issue warra within 48 hours to be released interpreted to mean only relea until warrant obtained).

Appendix B (Continued)

JURISDICTION	POLICE ESTIMATES	PROSECUTOR ESTIMATES	POLICE RELEASE AUTHORIZED BY LAW? YES/NO/UNCLEAR	LEGAL AUTHORITY FOR POLICE RELEASE
INDIANA				
Vigo/Terre Haute	No	Yes	NO	Dommer v. Hatcher, 427 S. Supp. 1040 (D. Ind. 1977).
La Porte	No	Yes	NO	SAME AS ABOVE
Lake/Crown Point	No	Yes	NO	SAME AS ABOVE
IOWA				
Scott/Davenport	No	Yes	NO	NO AFFIRMATIVE SUPPORT
LOUISIANA				
Caddo	No	Yes-less than 5%	UNCLEAR	Compare LA. Code Crim. Pro. Ann. art. 228 (duty of police to promptly book arrested person and keep imprisoned unless released on bail) with art. 230.1 C (person not brought before judge within 72 hours to be "released" forthwith")(West 1967).
MAINE				
York	Yes, not freq.	Depends	YES	Terriault v. Berton, 114 ME. 137 141-42, 95 A. 699, 701 (1915) (within police discretion to release for felony, but person arrested for misdemeanor must waive requirement to be brought before magistrate).
MARYLAND				
Cumberland	No	No	NO	Johnson v. State, 282 MD. 314,321 23, 384 A. 2d 709, 713-14(1978) (alternative holding)(Rule that a defendant "shall" be taken withou

Appendix B (Continued)

JURISDICTION	POLICE ESTIMATES	PROSECUTOR ESTIMATES	POLICE RELEASE AUTHORIZED BY LAW? YES/NO/UNCLEAR	LEGAL AUTHORITY FOR POLICE RELEASE
MARYLAND Cumberland (cont.)			NO	unnecessary delay before a judicial officer is "mandatory," denoting "an imperative obligation inconsistent with the exercise of discretion").
MASSACHUSETTS Norfolk	Yes, not freq.	Yes	YES	Keefe v. Hart, 213 MA. 476, 481-82, 100 N.E. 558, 559 (1913); Caffrey v. Drugan, 144 MA. 294, 296-97, 11 N.E. 96, 97 (1887).
Worcester	Yes - often	Yes	YES	SAME AS ABOVE
MICHIGAN Genesee/Flint	No	Yes - many times	PROBABLY YES[5]	See People v. Hamilton, 359 MI. 410, 416-17, 102 N.W. 2d 738, 472 (1960) (by implication).
Kent City	Yes, not freq.	No	PROBABLY YES	SAME AS ABOVE
Ottawa Beach	No	No	PROBABLY YES	SAME AS ABOVE
MINNESOTA St. Louis/Duluth	No	No	YES	MN. R. Crim. P. 4.02.
NEW JERSEY Monmouth/Freehold	No	No	NO	NO AFFIRMATIVE SUPPORT
NEW YORK Orange County	Yes, not freq.	Yes	YES	N.Y. Crim. Proc. Law §§ 140.20(4) (McKinney 1971).
Erie	No	No	YES	SAME AS ABOVE

Appendix B (Continued)

JURISDICTION	POLICE ESTIMATES	PROSECUTOR ESTIMATES	POLICE RELEASE AUTHORIZED BY LAW? YES/NO / UNCLEAR	LEGAL AUTHORITY FOR POLICE RELEASE
NORTH CAROLINA				
Wake/Raleigh	No	No	NO	State v. Parker, 75 N.C. 249, (1876)("The constable thus con stituted himself the judge, ju and executioner. This is the best description of depotism."
Mecklenburg/Charlotte	No	No	NO	SAME AS ABOVE
OHIO				
Clark	Yes - often	No	NO	OH. Rev. Code Ann. § 2935.03 (Anderson Supp. 1978); OH. R. Crim. P. 4(E).
OREGON				
Clackamas	No	Yes	NO	NO AFFIRMATIVE SUPPORT
PENNSYLVANIA				
Philadelphia	No	No	YES	See Comm'r v. Eaddy, 472 PA. 4 372 A. 2d 759 (1977).
Lackawanna	No	No	YES	SAME AS ABOVE
Lehigh	No	No	YES	SAME AS ABOVE
TENNESSEE				
Sullivan/Kingsport	No	No	YES	Hardin v. State, 210 TN. 105,1 355 S.W. 2d 105, 113 (1961);Ea v. State, 197 TN. 644, 648, 27 S.W. 2d 361, 363 (1955); Wynn State, 181 TN 325, 331, 181 S. 2d 332, 334 (1944).

Appendix B (Continued)

JURISDICTION	POLICE ESTIMATES	PROSECUTOR ESTIMATES	POLICE RELEASE AUTHORIZED BY LAW? YES/NO / UNCLEAR	LEGAL AUTHORITY FOR POLICE RELEASE
TEXAS				
Nueces/Corpus Christi	Yes, not freq.	Yes	POSSIBLY YES[6]	Osoba V. Wilson (TX Civ. App.)56 S.W. 2d 937, 940 (1933) (by implication); but see Ex parte Garcia (TX Crim. App.) 547 S.W. 271, 274 (1977); TX Crim. Pro. Code Ann. arts. 2.13,14.06 (Vernon 1977).
Lubbock/Marion Co.	No	Rarely	POSSIBLY YES	SAME AS ABOVE
Jefferson	Yes , not freq.	Yes	POSSIBLY YES	SAME AS ABOVE
Brazoria/Angleton	No	No response	POSSIBLY YES	SAME AS ABOVE
McCellard/Selby	No	Yes	POSSIBLY YES	SAME AS ABOVE
VIRGINIA				
Newport News	No	No	NO	See VA. Code § 19.2-82. (Michie 1975).
Norfolk	No	No	NO	SAME AS ABOVE
WISCONSIN				
Waukeskaw	Yes - often	Yes	YES	Peloquin v. Hibner, 231 WI. 77, 86-87, 285 N.W. 380, 385 (1939); WI Stat. Ann. § 968.08 (West 197

[1] Any discrepancies between the prosecutor's estimates and the police estimates for the same jurisdictions may be due to the fact that prosecutors' estimates are based on what all police departments in the jurisdiction do, whereas the individual responding police department is referring only to its practices.

[2] POLICE AUTHORITY TO RELEASE – None of the jurisdictions permit police to release a person arrested under a warrant, thus the table deals only with arrests without warrant.

[3] NO AFFIRMATIVE SUPPORT – The response "no" means that no support was found which would argue <u>for allowing</u> release; though in many cases support could be cited for arguing it would not be allowed. Most often it would turn on as interpreting "may" or "shall" in statutes defying arrest powers and procedures after arrest.

[4] PROBABLY NOT – Explicit statutory provision on the duty of the police to arrest or detain might be seen as evidence of an intent to restrict police descretion, especially if coupled with a penalty for failure.

[5] PROBABLY YES – Release might be allowed because the court recognizes the possibility that what first appeared to the police to constitute adequate grounds for arrest later disappeared.

Although the police are required to take the person arrested before a magistrate, release after arrest may not be inconsistent with the purpose of such requirement to protect against undesirable police practices (e.g. coerced confession) because no trial follows.

[6] POSSIBLY YES – Consistent use of words such as "may," "shall," "must," "any" or "every" permit interpretation of statutory provisions on arrest and bringing an arrested person before a magistrate as "mandatory" or "directory," especially if coupled with a penalty for failure.

APPENDIX C

QUESTION

POLICE: Does the prosecutor have a system whereby someone from his office is available to the police on a 24-hour basis? ON CALL? SOMEONE AT STATION?

PROSECUTOR: Do you have a system whereby someone from your office is available to the police on a 24-hour basis? ON CALL? SOMONE AT STATION?

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	PROSECUTOR
CALIFORNIA				
San Bernadino	Yes - on call	Yes - on call	& Beeper	& Beeper
San Francisco	Yes - on call	Yes - on call	-	Rotate on teams
Alameda/Oakland	Yes - on call	Yes - on call	Only in homicide cases	Lawyer & Invest. for major crimes
Santa Clara/San Jose	Yes - on call	Yes - on call	Rotating list	Lawyer & Invest.also
Riverside	Yes - on call	Yes - on call	-	-
COLORADO				
Jefferson	No Response	No Response	-	-
CONNECTICUT				
Litchfield	D.A. specialist available	Yes - on call	-	-
FLORIDA				
Palm Beach	Yes - at station	Yes - on call	On duty standby	Also lawyer
GEORGIA				
Muscogee/Columbus	Yes - on call	Yes - on call	Also legal advisor	-
INDIANA				
Vigo/Terre Haute	No	Yes - on call	Only 8-4	
LaPorte	Yes - on call	Yes - on call	-	-
Lake/Crown Pt.	No	No	-	-
IOWA				
Scott/Davenport	Yes - on call	Yes - on call	Beeper	-
LOUISIANA				
Caddo	Yes - on call	No	No-on scene visit only phone contacts.	Available for contact only on a voluntary basis.
MAINE				
York	Yes - on call	Yes - on call	-	-
MARYLAND				
Cumberland	Yes - on call	No	-	Only in emergencies (If complex situation)
MASSACHUSETTS				
Norfolk	Yes - on call	Yes - on call	Only at Sup. Ct. level not Dist. Ct. level	-
Worcester	No	Yes- on call	Calls Clerk of Court(Quasi-Judge)	-

APPENDIX C Telephone Survey Results Regarding Prosecutor's Availability to the Police (Continued)

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	PROSECUTOR
MICHIGAN				
Genesee/Flint	Yes - on call	Yes - on call	-	-
Kent City	Yes - on call	Yes - on call	If upcoming case, someone at dept.	-
Ottawa Beach	No	Yes - on call	Occasionally	-
MINNESOTA				
St. Louis/Duluth	Yes - on call	Yes - on call	-	-
NEW JERSEY				
Monmouth/Freehold	Yes - on call	Yes - on call	24-hour on duty assts. (DA) & Investigators	-
NEW YORK				
Orange County	Yes - on call	Yes - on call	-	-
Erie	Yes - on call	Yes - on call	Usually no one there	-
NORTH CAROLINA				
Wake/Raleigh	Yes	Yes - on call	-	-
Mecklenburg/Charlotte	Yes - on call	Yes - on call	-	-
OHIO				
Clark	Yes - on call	Yes - on call	-	Felony coordinator
OREGON				
Clackamas	Yes - on call	Yes - on call	& Beeper	-
PENNSYLVANIA				
Philadelphia	Yes - on call	Yes - on call	& 24 hr. on duty at station	24hr. court sessions
Lackawanna	Yes - on call	Yes - on call	Also victim/ witness liaison	-
Lehigh	Yes - on call	Yes - on call	-	-
TENNESSEE				
Sullivan/Kingsport	Yes - on call	Yes - on call	-	-
TEXAS				
Nueces/Corpus Christi	No	Yes - on call	-	-
Marion/Lubbock	Yes - on call	Yes - on call	-	3 indiv. on call
Jefferson	Yes - on call	Yes - on call	-	-
Brazoria-Angleton	Yes - on call	No Response	-	-
McCellard-Selby Co.	Doesn't Know	Yes - on call	-	-
VIRGINIA				
Newport News	Yes - on call	Yes - on call		
Norfolk	Yes - on call	No	Beeper	-

APPENDIX C Telephone Survey Results Regarding Prosecutor's Availability to the Police (Continued)

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	PROSECUTOR
WISCONSIN				
Waukeskaw	Yes - on call	Yes - on call	Beeper	-

Appendix D

CHARGING PROCEDURES[1]

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Alabama	Felony: by indictment by information filed by district attorney only if defendant pleads guilty [Ala. Const. art. 1, § 8 (1901, amendment 37, 1939); Ala. Code §§ 15-8-2, 15-15-21 (1975).] Misdemeanor: by indictment by affidavit or information filed by the district attorney when authorized by statute (e.g. liquor laws, Ala. Code §§ 28-4-33, 38-4-314) [Ala. Const. art. 1, § 8 (1901, amendment 37, 1939).]	Words conveying same meaning as statutory language sufficient [Ala. Code §§ 15-8-21, 15-8-22 (1975); Haynes v. State, 293 Ala. 221, 301 So.2d 208 (1974).]	Indictment: only by consent of defendant for incorrect matter; may not add charge of different offense [Ala. Code § 15-8-90 (1975); Crews v. State, 40 Ala.App. 306, 112 So.2d 805 (1959).] Other: not found
Alaska	Sentence greater than one year imprisonment: by indictment by information, only if defendant waives indictment, filed by prosecutor [Alaska Const. art I, § 8; Alaska Stat. § 12.80.020 (1973); Alaska R.Cr.P. 7(a), 7(b).]	Notes 4,5,6 [Alaska R.Cr.P. 7(c).]	Notes 7,8 [United States v. Libby, McNeil & Libby, 7 Alaska 356 (1929); Alaska R.Cr.P. 7(e).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Alaska (cont'd)	Sentence less than one year imprisonment by indictment by information filed by prosecutor [Alaska R.Cr.P. 7(a).]		
Arizona	Indictment Information filed by prosecutor, limited to charges specified by magistrate in order of commitment, following preliminary hearing on probable cause [Ariz. Const. art. 2, § 30; State v. Branham, 4 Ariz. App. 185, 418 P.2d 615 (1966); Fertig v. State, 14 Ariz. 540, 133 P. 99 (1913); Ariz. R.Cr.P. 2.1, 2.2, 13.5(b).]	Words conveying same meaning as statutory language sufficient [Hinds v. Territory, 8 Ariz. 372, 76 P. 469 (1904).] Note 5 [Ariz. R.Cr.P. 13.2.]	Notes 9, 10 [Ariz. R.Cr.P. 13.5(b).] Note 11 (information) [Ariz. R.Cr.P. 13.5(b).] Note 12 (indictment) [State v. Fogel, 16 Ariz. App. 246, 492 P.2d 742 (1972).]
Arkansas	Indictment Information filed by prosecutor [Ark. Const. art. 2, § 8 (1874, amendment 21 § 1, 1936); Ark. Stat. Ann. § 43-806 (1977).] Cannot be filed by deputy prosecuting attorney in his own name [Johnson v. State, 199 Ark. 196, 133 S.W.2d 15 (1939).]	Indictment: words conveying same meaning as statutory language sufficient [Ark. Stat. Ann. §§ 43-1006, 43-1022 (1977).] Information: not found	Indictment: Note 7 matters of form, but not to change nature or degree of crime charged [Ark. Stat. Ann. § 44-1024 (1977).] Information: only matters of form, but not to change nature or degree of crime charged [Silas v. State, 232 Ark. 248, 337 S.W.2d 644 (1960), cert. denied, 365 U.S. 821 (1961).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Ark. (cont'd)	Summons or arrest warrant only for misdemeanors tried in courts inferior to the circuit courts (circuit courts have exclusive felony jurisdiction and concurrent misdemeanor jurisdiction) [Burrow v. Hot Springs, 85 Ark. 396, 108 S.W. 823 (1908); Ark. Stat. Ann. §§ 43-101, 43-102, 43-1405, 44-104, 44-105, 44-106, 44-107, 44-108, 44-201, 44-203 (1977).]	Summons or arrest warrant: offense "stated in general terms" [Ark. Stat. Ann. § 43-102 (1977).] offense "named or briefly described" [Ark. Stat. Ann. § 44-107 (1977).] no written pleadings necessary [Ark. Stat. Ann. §§ 44-104, 44-105 (1977).]	Summons or arrest warrant: not found
California	Indictment Information filed by district attorney only after examination and commitment by magistrate, limited to offenses named in order of commitment or any offenses shown by the evidence taken before the magistrate [Cal. Const. art 1, § 14; Cal. Penal Code §§ 737-739 (West 1970).] Complaint only if the defendant has plead guilty to a felony, "where permitted by law" (specifically, by the statute defining the offense) [Cal. Penal Code § 682 (West 1970).]	Note 13 [Cal. Penal Code § 952 (West 1970).] Note 14 [Cal. Penal Code § 958 (West 1970).]	Note 9, only if evidence of offense was presented at preliminary hearing and does not prejudice substantial rights of defendant [People v. Bala, 197 Cal. App.2d 362, 17 Cal.Rptr. 204 (1962).] Note 15, at any time before defendant pleads or a demurrer to original pleading is sustained Notes 7, 16, at any stage of proceedings for any defect or insufficiency Indictment: cannot change offense charged

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Cal.(cont'd)			Information: limited to offense shown by the evidence taken before the magistrate at the preliminary hearing on probable cause Complaint: can add offense not attempted to be charged in original complaint only if might have been properly joined originally [Cal. Penal Code § 1009 (West 1970).]
Colorado	Felony and Misdemeanor Indictment [Colo. Const. art. II, § 8; Colo. Rev. Stat. § 16-1-1014(6) (1973); R.Cr.P. 7(a).] Information filed by the district attorney Note 7 if defendant did not request preliminary hearing or was bound over after a preliminary hearing [Colo. Rev. Stat. § 16-5-208 (1973); R.Cr.P. 7(b)(3).] Note 15 if no complaint was filed or the preliminary hearing resulted in discharge of defendant [R.Cr.P. 7(c).]	Indictment: charge must be stated "so plainly that the nature of the offense is easily understood by the jury" [Colo. Rev. Stat. § 16-5-201 (1973); R.Cr.P. 7(a)(2).] Information: need not use exact statutory words [Loggins v. People, 178 Colo. 439, 498 P.2d 1146 (1972); Gallegos v. People, 166 Colo. 409, 444 P.2d 267 (1968).]	Indictment: not as to matter of substance [R.Cr.P. 6.8(b).] Information: prior to trial Note 7 matter of form or substance prior to verdict or finding Note 7 matter of form only cannot charge additional or different offense only if "substantial rights of defendant not prejudiced" [R.Cr.P. 7(e).] cannot be amended without consent of prosecutor [People v. Zupancic, 557 P.2d 1195 (1976);

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Colo. (cont'd)	[Colo. Const. art. II, § 8; Colo. Rev. Stat. §§ 16-1-1014(6), 16-5-205 (1973).] Complaint, filed by the district attorney only if the defendant is bound over for trial in court [Colo. Rev. Stat. § 16-1-1014(6) (1973); R.Cr.P. 4(a)(1), 7(a)(4).] if it contains the requirements of an information, it "shall be deemed to be an information" [R.Cr.P. 7(a)(4).] Misdemeanor summons and complaint filed by a police officer complaint [Colo. Rev. Stat. §§ 16-2-104,-106, -113 (1973).]	Complaint for felony same as information [R.Cr.P. 7(a)(4).] Misdemeanor complaint identify offense charged, including citation of statute and a "brief statement or description of the offense charged" [Colo. Rev. Stat. § 16-2-106 (1973).]	Mendez v. Tinsley, 139 Colo. 127, 336 P.2d 706 (1959); Bustamante v. People, 136 Colo. 362, 317 P.2d 885 (1957).] Complaint not found
Connecticut	Sentence punishable by death or life imprisonment by indictment [Conn. Const. art. 1, § 8; Conn. Gen. Stat. Ann. § 54-45 (West Supp. 1979).] All other crimes by information or complaint [Conn. Gen. Stat. Ann. § 54-46 (West Supp. 1979); R.Cr.P. § 2024.]	Indictment Notes 4,5 Information Note 5 sufficient to set out statutory name of offense [State v. Ruiz, 171 Conn. 264, 368 A.2d 222 (1976).] [R.Cr.P. § 2026.] Complaint not found	Before trial commences prosecuting attorney may amend, add counts or file substitute to the information defendant may request added counts or substitute information striken if trial would be unduly delayed or if substantial rights of defendant would be prejudiced [R.Cr.P. § 2031.]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Conn.(cont'd)			Before verdict or finding may charge additional or different offense with express consent of defendant Note 7, "for good cause shown" may amend indictment or information only if no additional or other offense charged and substantial rights of defendant would not be prejudiced [R.Cr.P. § 2032.]
Delaware	Sentence punishable by death by indictment [Superior Court R.Cr.P. 7(a).] Other felonies and indictable crimes by indictment by information, only if defendant waives indictment, filed by prosecutor [Superior Court R.Cr.P. 7(a), 7(b).] Nonindictable misdemeanors by information [Ct. C.P. R.Cr.P. 7(a).]	Exact statutory words not necessary [Lasby v. State, 55 Del. 145, 185 A.2d 271 (1962).] Notes 4,5,6 [Super. Ct. R.Cr.P. 7(c); Ct. C.P. R. Cr.P. 7(b).]	Indictment Note 17 Information Note 8 [Super. Ct. R.Cr.P. 7(e); Ct. C.P. R.Cr.P. 7(c).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
District of Columbia	Offense punishable by death sentence by indictment Other felony by indictment by information, only if defendant waives indictment, filed by prosecutor Misdemeanor by indictment by information [U.S. Const. amend. V; Wittenberg v. United States, 366 A.2d 128 (D.C. 1976); D.C. Code Ann. § 23-301 (1973); F.R.Cr.P. 7(a); Super.Ct. R. Cr.P. 7(a).]	Note 14 [United States v. Jeffries, 45 F.R.D. 110 (D.D.C. 1968)(indictment); District of Columbia v. Jordan, 232 A.2d 298 (D.C. 1967)(information).] Notes 4,5,6 [F.R.Cr.P. 7(c)(1), 7(c)(3); Super.Ct. R.Cr.P. 7(c).]	Note 8 [F.R.Cr.P. 7(e); Super.Ct. R.Cr.P. 7(e).] Indictment can only be amended for matter of form, even if defendant consents to amendment on matter of substance [Russell v. United States, 369 U.S. 749 (1962); Crosby v. United States, 339 F.2d 743 (D.C. Cir. 1964); Johnson v. United States, 364 A.2d 1198 (D.C. 1976).]
Florida	Capital crime by indictment [R.Cr.P. 3.140(a)(1).] Other felony by indictment by information filed by the prosecutor [R.Cr.P. 3.140(a)(2).] [Fla. Const. art. 1, § 15(a).] Misdemeanor by indictment by information filed by prosecutor [Fla. Stat. Ann. § 34.13(1); R.Cr.P. 3.140(a)(2).]	Notes 4,5,6 [R.Cr.P. 3.140(b), 3.140(d).] May use words of equivalent import to statutory language [Leeman v. State, 357 So.2d 703 (Fla. 1978).]	Indictment Note 17 Only grand jury can alter [Perez v. State, 371 So.2d 714 (Fla. Dist. Ct. App. 1979).] Information formal defects only [R.Cr.P. 3.140(j).]

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Georgia	Capital offense by indictment only [Ga. Code Ann. § 27-704 (Harrison 1974).] Other felony by indictment [Webb v. Henlery, 209 Ga. 447, 74 S.E.2d 411 (1953), overruled on other grounds, Garmon v. Johnson, 257 S.E.2d 276 (Ga. 1979).] by accusation of district attorney, only if defendant waives indictment Misdemeanor by indictment by accusation filed by the district attorney [Ga. Code Ann. § 27-704.]	Note 14 [Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975); Moore v. Caldwell, 231 Ga. 485, 202 S.E.2d 425 (1973).] Indictment may state the charge "so plainly that the nature of the offense charged may easily be understood by the jury" [Ga. Code Ann. § 27-701.]	Indictment Note 12 [Gentry v. State, 63 Ga.App. 275, 11 S.E.2d 39 (1940).] Accusation may be amended by prosecutor [Sutton v. State, 54 Ga.App. 349, 188 S.E. 60 (1936).] cannot state a charge broader than in affidavit upon which warrant issued before or after arrest [Rowles v. State, 143 Ga.App. 553, 239 S.E.2d 164 (1977).]
Hawaii	Capital or otherwise infamous crime by indictment [Hawaii Const. art. I, § 8.] Other felony, misdemeanor by indictment by information filed by the prosecuting officer [Hawaii Rev. Stat. §§ 801-8, 806-6, 806-8(1976).] Misdemeanor by complaint [Hawaii Rev. Stat. §§ 604-8, 805-6 (1976).]	Indictment, information may employ words of "substantially the same import" as the statutory words [Hawaii Rev. Stat. §§ 806-9, -28 (1976).] may charge by name of offense or by reference to statute defining it or making it punishable [Hawaii Rev. Stat. §§ 806-9, -34 (1976).] Complaint not found	Matters of facial defect only [Hawaii Rev. Stat. §§ 806-9, 806-46 (1976).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Idaho	Indictment Information filed by prosecuting attorney after commitment by magistrate following preliminary examination, unless examination is waived by the defendant [Idaho Const. art. 1, § 8; Idaho Code Ann. §§ 19-102, 19-1308 (Bobbs-Merrill 1979).] information cannot charge offense of a greater degree or different nature from the magistrate's order of commitment [State v. McGreevey, 17 Idaho 453, 105 P. 1047 (1909).]	Words conveying same meaning as statutory language sufficient [Idaho Code Ann. §§ 19-1304, 19-1417 (Bobbs-Merrill 1979).]	Cannot be amended to charge offense other than which the defendant was held to answer in the magistrate's order of commitment [Idaho Code Ann. § 19-1420 (Bobbs-Merrill 1979).]
Illinois	Felony by indictment by information filed by the state's attorney only after a preliminary hearing, which resulted in a finding of probable cause, or a waiver of the hearing by the defendant; information may charge all offenses arising from the same transaction or conduct [Ill. Ann. Stat. ch. 38, § 111-2(a), -2(f)(Smith-Hurd 1970).]	Must: state name of offense cite statutory provision set forth "nature and elements of offense" [Ill. Ann. Stat. ch. 38, § 111-3(a)(Smith-Hurd 1970).] Note 14 [People v. Bowman, 132 Ill.App.2d 744, 270 N.E.2d 285 (1971)(complaint).]	Formal defects only [Ill. Ann. Stat. ch. 38, § 111-5 (Smith-Hurd 1970).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Ill. (cont'd)	All other offenses by indictment by information by complaint [Ill. Ann. Stat. ch. 38, § 111-2(b) (Smith-Hurd 1970).] [Ill. Const. art. 1, § 7.]		
Indiana	Indictment Information [Ind. Code § 35-3.1-1-1 (Supp. 1979).]	Words conveying same meaning as statutory language sufficient [Ind. Code § 35-3.1-1-2(a)(2)(1976).] Notes 4,5,6 [Ind. Code § 35-3.1-1-2 (1976).]	Cannot change the theory of prosecution as originally stated Note 7 at any time before arraignment may amend in matters of form or substance [Ind. Code § 35-3.1-1-5(b), -5(e)(Supp. 1979).]
Iowa	Indictment Information, only with the approval of a judge or magistrate by a finding that the evidence contained therein would warrant a conviction by a trial jury [Iowa Const. art. 1 § 11 (1857, amendment 3, 1884); R.Cr.P. 4(2.), 5(1.), 5(4.).]	Note 4 [R.Cr.P. 4(7.), 5(5.).] Note 14 [State v. Jacob Decker & Sons, 197 Iowa 41, 196 N.W. 600 (1924); Buckly v. State, 2 Greene 162 (1849).]	May not charge "wholly new and different offense" Note 7, to correct errors or omissions in matters of form or substance [R.Cr.P. 4(8.a.), 5(5.).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Kansas	Felony by indictment by information, only for the crime for which the defendant was bound over after a preliminary examination on a complaint Misdemeanor by indictment by information, only after a finding of probable cause by the judge [Kan. Stat. Ann. §§ 22-2303(1), -2905(1), 3201(1)(1974 & Supp. 1979).]	Notes 4,5,6 [Kan. Stat. Ann. § 22-3201(2)(Supp. 1979).] Note 14, information [State v. Lucas, 221 Kan. 88, 557 P.2d 1296 (1976).]	Note 17 Note 8, information [Kan. Stat. Ann. § 22-3201 (4) (Supp. 1979).]
Kentucky	Felony and misdemeanor punishable by a sentence including loss of suffrage ("infamous") by indictment Non-infamous misdemeanors by information filed by the attorney for the Commonwealth [Ky. Const. art. 1, § 12; R.Cr.P. 6.02; Ky. Rev. Stat. §§ 431.060, 500.080 (Bobbs-Merrill 1975 & Supp. 1978); Commonwealth v. Hope, 492 S.W.2d 207 (Ky. 1973); Elkin v. Commonwealth, 269 Ky. 6, 106 S.W.2d 83 (1937); King v. City of Pineville, 222 Ky. 73, 299 S.W. 1082 (1927); Lakes v. Goodloe, 195 Ky. 240, 242 S.W. 632 (1922).]	Notes 4,5,6 [R.Cr.P. 6.10(2), 6.10(3).] Note 18 [Spears v. Commonwealth, 399 S.W.2d 693 (Ky. 1966); Int'l Shoe Co. v. Commonwealth, 300 Ky. 806, 190 S.W.2d 553 (1946).]	Notes 7,8 [R.Cr.P. 6.16.] Trial court cannot amend without consent of the state [Allen v. Walter, 534 S.W.2d 453 (Ky. 1976).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Louisiana	Capital offense or punishable by life imprisonment by indictment Other felony by indictment by information filed by the district attorney Misdemeanor by indictment by information by affidavit [La. Const. art. 1, § 15; La. Code Crim. Pro. Ann. art. 382 (West Supp. 1979).]	Notes 4,5,6 [La. Code Crim. Pro. Ann. arts. 461, 464 (West 1967).] Note 14 [State v. Mayeux, 228 La. 6, 81 So.2d 426 (1955); State v. Murff, 215 La. 40, 39 So.2d 817 (1949).]	Note 7 before trial for defect of substance at any time only for defect of form [La. Code Crim. Pro. Ann. arts. 461, 487 (West 1967 & Supp. 1979).] Note 9 [La. Code Crim. Pro. Ann. arts. 461, 488 (West 1967).]
Maine	Murder by indictment Other felonies (class A, B and C crimes) by indictment by information, only if defendant waives indictment, filed by the attorney for the state Misdemeanor (class D crime) by information by complaint [Me. Const. art. I, § 7; Ex parte Gosselin, 141 Me. 412, 44 A.2d 882 (1946); Opinion of the Justices, 338 A.2d 802 (Me. 1975); Me. Rev. Stat. Ann. tit. 15, §§ 707, 708, tit. 17-A, §§ 9, 1251, 1252 (1964 & Supp. 1975-1979); R.Cr.P. 7(a).]	Notes 4,5,6 Need not be in exact statutory language if necessary elements set forth with sufficient particularity and clarity [R.Cr.P. 7(c); State v. Mann, 361 A.2d 897 (Me. 1976).]	Notes 7,8,17 [R.Cr.P. 7(e).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Maryland	Indictment Information filed by the state's attorney if: misdemeanor; or felony within jurisdiction of the district court, e.g. (e.g. theft); or any felony and lesser included offenses, only if: defendant consents; or finding of probable cause at preliminary hearing; or defendant waives preliminary hearing on the felony charged Statement of charges, filed by a police officer if: misdemeanor; or felony within jurisdiction of the district court (e.g. theft) [Md. Ann. Code art 27 § 592 (Michie 1976); Md. R.Pr.-Cr. 710; Md. Dist.R. 710.]	Notes 4,5,6 [Md. R.Pr.-Cr. 711; Md. Dist.R. 711.] Note 14 [Beasly v. State, 17 Md.App. 7, 299 A.2d 482 (1973); Carpenter v. State, 200 Md. 31, 88 A.2d 180 (1952).]	Note 7, indictment any time before a verdict; if amendment changes the substance of indictment, consent of the parties is required [Md. R.Pr.-Cr. 713(b); Md. Dist.R. 713.] Note 7, information, statement of charges if amendment changes the character of the offense charged, consent of the parties is required [Md. R.Pr.-Cr. 713(a); Md. Dist.R. 713.]
Massachusetts	Capital crime indictment Other felony indictment complaint, only if defendant waives indictment, filed by prosecutor Other crime indictment complaint [R.Cr.P. 3; Jones v. Robbins, 74 Mass. (8 Gray) 329 (1857).]	Words conveying same meaning as statutory language sufficient in indictment [Mass. Ann. Laws ch. 277, § 17 (Michie 1968).] Note 4, complaint [R.Cr.P. 4(a).]	Note 7, only if amendment would not prejudice the defendant or the state, matters of form only [Mass. Ann. Laws ch. 277, § 35A (Michie 1968); Commonwealth v. Massod, 350 Mass. 745, n. 2 at 749, 217 N.E.2d 191 at 194 (1966)(complaint); Commonwealth v. Snow, 269 Mass. 598, 169 N.E. 542 (1930); R.Cr.P. 4(d).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Michigan	Indictment Information filed by prosecutor only after preliminary examination unless waived by defendant; charge limited to offense contained in warrant (if examination waived), or limited to transaction which was the subject of the examination [Mich.Comp. Laws Ann. §§ 767.1, 767.41, 767.42(1) (West 1968 & Supp. 1968-1979).] Warrants issued for arrest, or following preliminary examination, only with approval of prosecuting attorney [Mich. Comp. Laws Ann. §§ 764.1, 766.13 (West Supp. 1968-1979).]	Note 13 [Mich. Comp. Laws Ann. § 767.45(1.) (West 1968).] Note 14 [People v. Mankel, 373 Mich. 509, 129 N.W.2d 894 (1969); People v. Covelesky, 217 Mich. 90, 185 N.W. 770 (1921).]	Notes 7,9 can amend for any defect in form or substance [Mich. Comp. Laws Ann. §§ 767.2, 767.76 (West 1968).]
Minnesota	Crime punishable by life imprisonment by indictment Felony, misdemeanor by indidment by complaint, filed only with the consent of the prosecuting attorney unless unavailable Misdemeanor by tab charge (brief statement on the records by clerk in absence of other charging document) [R.Cr.P. 2.02, 3.04, 4.02, 17.01.]	Notes 4,5,6, indictment, complaint [R.Cr.P. 2.02, 17.02.] Note 14, indictment [Minn. Stat. Ann. § 628.17 (West 1947).] Note 5, tab charge "a brief statement" [R.Cr.P. 4.02(3).]	Note 8, indictment, complaint [R.Cr.P. 17.05.]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Mississippi	Felony by indictment by information filed by the prosecutor only if defendant waives indictment Misdemeanor by indictment by information [Miss. Const. art. 3, § 27 (1890, amended 1978).]	Note 18 [Grantham v. State, 284 So.2d 523 (Miss. 1973); Ferguson v. State, 198 Miss. 825, 23 So.2d 687 (1945); Roberts v. State, 55 Miss. 421.]	Notes 10, 12 [Miss. Code Ann. § 99-7-21 (1972); Langford v. State, 239 Miss. 483, 123 So.2d 614 (1960); Blumenburg v. State, 55 Miss. 528; McGuire v. State, 35 Miss. 366, 72 Am.Dec. 124 (1858).]
Missouri	Felony by indictment by information filed by the prosecutor only after preliminary examination for probable cause, unless examination waived by defendant Misdemeanor by indictment by information [Mo. Const. art 1§ 17; Mo. Ann. Stat. §§ 544.250 (Vernon Supp. 1979), 545.010 (Vernon 1953); R.Cr.P. 21.01, 23.02.]	Notes 4,5 [R.Cr.P. 24.01(a).]	Notes 7,8,17 information [Mo. Ann. Stat. § 545.300 (Vernon 1953); R.Cr.P. 24.02.]

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Montana	Indictment Information, either: by leave of court; or after preliminary examination and finding of probable cause by magistrate [Mont. Const. art. II, § 20; Mont. Code Ann. § 46-11-102 (1978).]	Charge must state the name of the offense cite the statutory provision (Note 5) state the facts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what intended [Mont. Code Ann. § 46-11-401(1)(1978).]	Matter of substance: once, any time at least 5 days prior to trial Note 15 Matter of form Notes 7,8
Nebraska	Indictment Information filed by the county prosecutor only after preliminary examination for probable cause, unless examination waived by defendant [Neb. Const. art. I, § 10; Neb. Rev. Stat. §§ 29-1601, -1607 (1975).]	Note 18 [Smith v. State, 72 Neb. 345, 100 N.W. 806 (1904); Neb. Rev. Stat. § 29-1603 (1975).]	Note 7, before trial only if does not change nature or identity of offense and does not charge offense other than one on which defendant had preliminary examination [State v. Costello, 199 Neb. 43, 256 N.W.2d 97 (1977); State v. Gascoigen, 191 Neb. 15, 213 N.W.2d 452 (1973).] Note 17

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Nevada	Indictment Information filed by the district attorney, only after preliminary examination on probable cause, or after examination waived by defendant [Nev. Const. art. 1, § 8; Nev. Rev. Stat. §§ 172.015, 173.025, .035 (1973, 1975).]	Notes 4,5,6 [Nev. Rev. Stat. § 173.075 (1975).]	Note 8 [Nev. Rev. Stat. § 173.095 (1975).]
New Hampshire	Capital offense by indictment Felony by indictment by complaint only if the defendant waives indictment and subject to court approval Misdemeanor by complaint [N.H. Rev. Stat. Ann. §§ 502:18, 502-A:7, :11, 601:2, :3, :3-a (1974 & Supps. 1977, 1978).] "information" seems to be available, but not specifically provided for [N.H. Rev. Stat. Ann. §§ 601 (ch. heading), 601:4, 601:5 passim; State v. Town of Dover, 9 N.H. 468 (1838)(attorney general may file information for misdemeanors and non-infamous crimes).]	"set forth the offense fully, plainly, substantially and formally; not necessary to set forth the statute on which the offense is founded" [N.H. Rev. Stat. Ann. § 601:4 (1974).] the complaint "shall be drafted in accordance with the statute" [Dist. Ct. R. 2.1(A.).] Note 18 [State v. Gove, 34 N.H. 510 (1857).]	Notes 7,10 [N.H. Rev. Stat. Ann. § 601:8 (1974); State v. Kelley, 66 N.H. 577, 29 A. 843 (1891).] Note 8, complaint [Dist. Ct. R. 2.1(B.).]

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
New Jersey	Capital crime by indictment Other felony, misdemeanor by indictment by accusation, only if defendant waives indictment, filed by the prosecuting attorney [N.J. Const. art. 1, par. 8; R.Cr.Prac. 3:7-2.]	Notes 4,5,6 [R.Cr.Prac. 3:7-3.] Words "substantially similar" to statutory language sufficient [State v. Lombardo, 18 N.J. Super. 511, 87 A.2d 375 (1952).]	Notes 7,8 [R.Cr.Prac. 3:7-4.]
New Mexico	Felony by indictment by information, only after preliminary examination on probable cause or if examination waived by defendant Misdemeanor by complaint [N.M. Const. art. II, § 14, art. XX, § 20; R.Cr.P. (Magis. Ct.) 4(a).]	Indictment contains: essential facts constituting the offense common name of the offense specific section number of the statute which defines the offense, if applicable [R.Cr.P. (Dist. Ct.) 5(d).] Must follow the statutory words; variance fatal [Tenorio v. Territory, 1 N.M. 279 (1859).] Information: same as above, except not "constituting the offense" [R.Cr.P. (Dist. Ct.) 5(c).]	Notes 7,8 indictment, information [R.Cr.P. (Dist. Ct.) 7(a).] Notes 7,9 indictment, information [R.Cr.P. (Dist. Ct.) 7(c).] Notes 7,8 complaint [R.Cr.P. (Magis. Ct.) 5(a).] Notes 7,9 complaint [R.Cr.P. (Magis. Ct.) 5(c).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
New Mexico (cont'd)		Complaint contains: the facts common name of the offense specific section number of the statute which contains the offense where applicable [R.Cr.P. (Magis. Ct.) 4(a).]	
New York	Capital crimes and felonies punishable by life sentence by indictment Felony by indictment by "superior court information" only if defendant waives indictment, filed by district attoryney and limited to offenses named in waiver Misdemeanor by indictment by "prosecutor's information" filed by the district attorney and which supersedes an "information" by "information" filed by any person, at least one count of which must charge an offense which was the subject of the misdemeanor complaint which it replaces as basis for prosecution	indictment, superior court information Notes 4,13 [N.Y. Crim.Proc. Law §§ 200.15, .50 (McKinney 1971 & Supp. 1972-1979).] Note 14 [People v. Jaehne, 103 N.Y. 182, 8 N.E. 374 (1886); Eckhardt v. People, 83 N.Y. 462 (1881); People v. Rouss, 63 Misc. 135, 118 N.Y.S. 433 (1909).]	indictment, prosecutor's information, superior court information cannot change theory of prosecution [N.Y. Crim. Proc. Law §§ 100.45(2.), 200.15, 200.70(2.) (McKinney 1971 & Supp. 1972-1979).] information may be amended even for matters of substance [People v. Easton, 307 N.Y. 336, 121 N.E.2d 357 (1954); People v. Mulligan, 64 Misc.2d 143, 314 N.Y.S.2d 421 (1970).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
New York (cont'd)	by "misdemeanor complaint" filed by any person, a basis for prosecution only when the defendant waives "information" [N.Y. Const. art. I, § 6 (1894, amended 1974); N.Y. Crim. Proc. Law §§ 1.20, 10.20, 100.10, 100.50, 170.65, 195.10, 195.20, 200.15 (McKinney 1971 & Supps. 1972-1979, 1979).]		
North Carolina	Capital cases by indictment Felony by indictment by information, only if indictment waived by the defendant, filed by the solicitor Misdemeanor by indictment (few cases) by information (" ") by statement of charges filed by solicitor by warrant or summons by citation, unless defendant objects, in which case a statement of charges, a warrant or a summons is filed by the solicitor to replace the citation [N.C. Const. art. I, § 22; N.C. Gen. Stat. §§ 15A-641, -642(b), -922, -923 (Michie 1975).]	Note 14 [State v. Carpenter, 173 N.C. 767, 92 S.E. 373 (1917)(by implication); State v. Bigelow, 19 N.C.App. 570, 199 S.E.2d 494 (1973).] Notes 4,5,6,13 [N.C. Gen. Stat. § 15A-924(a)(5) (Michie 1975).]	Indictment not amendable Information, only by consent of defendant Other, only if the nature of the offense is unchanged [N.C. Gen. Stat. §§ 15A-922(f), -923(d), -923(e) (Michie 1975 & Supp. 1979).]

APPENDIX D Charging Procedures (Continued)

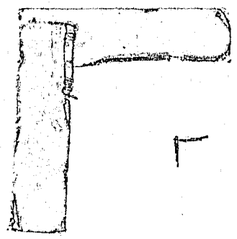
Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
North Dakota	Felony by indictment by information Misdemeanor by indictment by information by complaint [N.D. Const. art I, § 8; N.D. Cent. Code §§ 27-05-06, -08-20, -18-04, 29-01-01 (Allen Smith 1974); R.Cr.P. 3(a), 7(a).]	Note 14 [State v. Motsko, 261 N.W.2d 860 (N.D. 1977).] Note 4 indictment, information, complaint [R.Cr.P. 3(a), 7(c).] Notes 5,6 indictment, information [R.Cr.P. 7(c).]	Note 17 Notes 7,8 information, complaint [R.Cr.P. 3(b), 7(e).]
Ohio	Capital crimes and felonies punishable by life sentence by indictment Other felony by indictment by information, only if defendant waives indictment, filed by the prosecutor Misdemeanor by indictment by information by complaint [Ohio Const. art I, § 10; Ex parte Stephens, 171 Ohio St. 323, 170 N.E.2d 735 (1960); Ohio Rev. Code Ann. § 2941.021 (Baldwin 1974); R.Cr.P. 7(A).]	Notes 4,5,6,13 [R.Cr.P. 7(B); Ohio Rev. Code Ann. § 2941.05 (Baldwin 1974).]	Notes 7,8 [R.Cr.P. 7(D).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Oklahoma	Felony by indictment by information, only after preliminary examination on probable cause, or if examination waived by defendant Misdemeanor by information filed by the county attorney [Okla. Const. art. VII, § 17; Okla. Stat. Anno. tit. 22, §§ 2,301, 303 (West 1969).]	Words conveying same meaning as statutory language sufficient [Okla. Stat. Ann. tit. 22, § 408 (West (1969).]	Note 12 [Roberson v. State, 362 P.2d 1115 (Okla. Crim. App. 1961).] Information Note 15, before the defendant pleads as to matters of form and substance Note 7, after plea if without material prejudice to the defendant's rights [Okla. Stat. Ann. tit. 22, § 304 (West 1969).]
Oregon	Felony by indictment by information, only if: defendant waives indictment; or defendant waives a preliminary hearing on probable cause; or defendant has been held to answer for a felony following a finding of probable cause at a preliminary hearing Misdemeanor by "district attorney's information" by complaint, filed by any person [Or. Const. art. VII, § 5; Or. Rev. Stat. § 131.005 (1977).]	Words conveying same meaning as statutory language sufficient [Or. Rev. Stat. § 132.540(3)(1977); Or. Const. art. VII, § 5(6).]	Note 10 indictment, information [Or. Const. art. VII, § 5(6).] district attorney's information, complaint not found

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Pennsylvania	Capital crimes and crimes punishable by life imprisonment by indictment All other offenses by indictment by information, only if defendant waives indictment or in those counties where the grand jury has been abolished, filed by the attorney for the Commonwealth [Pa. Const. art I, § 10 (1874, amended 1973); Pa. Cons. Stat. Ann. § 8931 (Purdon Supp. 1979)(Judicial Code); R.Cr.P. 3(i), 215, 225(a).]	Note 4, "substantially the same or cognate to the offense alleged in the complaint" Notes 5,6 [R.Cr.P. 213, 225.]	Note 10, cannot charge an additional or different offense Note 7 [R.Cr.P. 220, 229.]
Rhode Island	Capital crime by indictment Offense punishable by life imprisonment by indictment by information, only if defendant waives indictment with the consent of the court and the attorney general Other felony by indictment by information filed by the attorney general Note 15 by complaint, only if the defendant consents and waives information	Notes 4,5,6,13 May either: use statutory or common law name; or state the definition of the offense in terms of substantially the same meaning [R.I. Gen. Laws § 12-12-1.4 (Supp. 1980); R.Cr.P. (Super. Ct.) 7(c); R.Cr.P. (Dist. Ct.) 6(a).]	Notes 7,8,10 with the consent of the defendant [R.Cr.P. (Super. Ct.) 7(e); R.Cr.P. (Dist. Ct.) 6(d).]



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APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Rhode Island (cont'd)	Misdemeanor by complaint Note 15 [R.I. Const. art. XL (1973); R.I. Gen. Laws §§ 12-12-1.1, -1.2, -1.3 (Supp. 1980); R. Cr.P. (Super. Ct.) 7(a), 7(b).]		
South Carolina	Indictment [S.C. Const. art. I, § 11; S.C. Code § 17-19-10 (1976).]	Substantially in the language of the common law or the statute, or so plainly that the nature of the offense may be easily understood [S.C. Code § 17-19-20 (1976).]	Notes 7,9,10 only if the nature of the offense is not changed [S.C. Code § 17-19-100 (1976).] Defendant may consent by waiver to a material change [State v. Faile, 43 S.C. 52, 20 S.E. 798 (1895).]
South Dakota	Indictment Information, only after defendant has had or waived a preliminary hearing, filed by the prosecuting attorney and limited to the offense held for by committing magistrate [S.D. Const. art. VI, § 10; S.D. Codified Laws Ann. §§ 23A-6-1, -3 (1979); R.Cr. P. 7(a); State v. Anderson, 60 S.D. 187, 244 N.W. 119 (1932).]	Notes 4,5,6 [S.D. Codified Laws Ann. § 23A-6-4 (1979); R.Cr.P. 7(c)(1).] Words conveying same meaning as statutory language sufficient [S.D. Codified Laws Ann. § 23A-6-17 (1979).]	Note 17 Prior to trial prosecuting attorney may add or change allegations regarding any offense arising out of the conduct which gave rise to the offense alleged in the original information After trial commences Notes 7,8 With the defendant's consent prosecutor may charge an additional or different offense [S.D. Codified Laws Ann. § 23A-6-19 (1979).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Tennessee	Indictment Information, only if defendant waives indictment [Tenn. Const. art. 1, § 14; Tenn. Code Ann. §§ 40-301, -306 (Supp. 1979).]	Note 14 [Watson v. State, 158 Tenn. 212, 12 S.W.2d 375 (1928); State v. Pennington, 40 Tenn. 119 (1859).]	With the defendant's consent charging document may be amended "in all cases" Notes 7,8 [Tenn. R.Cr.P. 7(b).]
Texas	Capital felony by indictment Other felony by indictment by information, only if defendant waives indictment, filed by the district or county attorney Other offense by indictment by information filed by the prosecutor [Tex. Const. art. 1, § 10; Tex. Code Crim. Pro. Ann. arts. 1.05, 1.141, 21.20 (West 1966, 1977).]	Words conveying same meaning as statutory language sufficient [Tex. Code Crim. Pro. Ann. art. 21.17 (West 1966).]	Notes 7,10 only prior to announcement of ready for trial [Tex. Code Crim. Pro. Ann. arts. 28.10, .11 (West 1966).]
Utah	Indictment Information, following preliminary examination and commitment by magistrate, unless examination waived or for misdemeanor triable in lower courts;	May charge: by using the name given to the offense by the common law or by statute; or	Note 17 Prior to defendant's plea Note 15, information may be amended in any matter of form or substance After defendant's plea Note 7 in any matter of form or substance

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Utah (cont'd)	information following preliminary examination only can charge the defendant with the offense for which he was held to answer by the magistrate [Utah Code Ann. §§ 77-1-4, 77-16-1, 77-17-1, -3 (Allen Smith 1978).]	by stating so much of the offense as defined in common law or statutory terms or in terms of substantially the same meaning, as is sufficient to give the defendant and court notice of what offense is intended to be charged May also refer to a section or subsection of a statute creating the offense, and the sufficiency of the information or indictment shall be determined with regard to the reference [Utah Code Ann. § 77-21-8 (Allen Smith 1978).]	Cannot amend so as to charge an offense of a different nature than that for which the defendant was examined and committed by the magistrate [Utah Code Ann. § 77-7-3 (Allen Smith 1978); State v. Caputo, 69 Utah 266, 254 P. 141 (1927).]
Vermont	Note 15 by indictment by information [R.Cr.P. 7(a).]	Notes 4,5,6,14 [R.Cr.P. 7(b); State v. Little, 1 Vt. 331 (1828).]	Notes 7,8 "for any purpose" [R.Cr.P. 7(d).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Virginia	Felony by indictment by information, only if defendant waives indictment, filed by the attorney for the Commonwealth Other offense by indictment by information filed by the Commonwealth's attorney [Va. Code §§ 19.2-217, -218 (1975).]	Note 4 charge may describe the offense by using the name from the common law, or it may state so much of the statutory or common law definition as is sufficient to advise what offense is charged Note 14 [Va. Code § 19.2-220 (1975); Wilder v. Commonwealth, 217 Va. 145, 225 S.E.2d 411 (1976).]	Notes 7,8,9,10 [Va. Code § 19.2-231 (1975).]
Washington	Felony by indictment by information filed by the prosecuting attorney Misdemeanor by complaint [Wash. Const. art. 1, § 25; Wash. Rev. Code Ann. § 10.37.015 (West 1961); Super. Ct. Cr.R. 2.1(a); J. Ct. Cr.R. 2.01.]	Words conveying same meaning as statutory language sufficient [Wash. Rev. Code Ann. § 10.37.160 (West 1961).] Notes 4,5,6 [Wash. Rev. Code Ann. § 10.37.050 (West 1961); Super. Ct. Cr.R. 2.1(b); J. Ct. Cr.R. 2.04(a).]	Notes 7,8,17 indictment, information [Super. Ct. Cr.R. 2.1(d).] Complaint not found

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
West Virginia	Indictment [W.Va. Const. art. III, § 4; W.Va. Code Ann. § 62-2-1 (Michie 1977).]	Note 13 [State ex rel. Hubbard v. Spillers, 202 S.E.2d 180 (1974).] Note 18 "describe the offense in the language, purport or tenor of the statute as near as may be" [W.Va. Code Ann. § 62-9-1 (Michie 1977).]	Note 10 cannot charge separate and distinct offense from in the original indictment [State v. McGraw, 140 W.Va. 547, 85 S.E.2d 849 (1955).]
Wisconsin	Felony by indictment by information filed by the district attorney Misdemeanor by indictment by complaint, only when approved by the district attorney unless unavailable, then if a judge finds probable cause [Wisc. Stat. Ann. §§ 967.05, 968.02 (West 1971 & Supp. 1979-1980.]	Note 14 [State ex rel. Schulter v. Roraff, 39 Wis.2d 159 N.W.2d 25 (1968), cert. denied, 393 U.S. 1066 (1969); Huebner v. State, 33 Wis.2d 505 (1967).]	Note 15 complaint, information prior to arraignment Notes 7,9 at trial if not prejudicial to the defendant after verdict if objection not raised during trial when offered [Wisc. Stat. Ann. § 971.29 (West 1971).]

APPENDIX D Charging Procedures (Continued)

Jurisdiction	Formal Accusatory Methods[2]	Charging Language[3]	Amendability of Charge
Wyoming	Indictment Information, filed by the prosecutor [Wyo. Const. art. 1, §§ 9, 13; R.Cr.P. 9(a).]	Notes 4,5,6,18 [R.Cr.P. 9(a); Gonzales v. State, 551 P.2d 929 (Wyo. 1976).]	Note 15 information any time before defendant pleads for matter of form or substance Notes 7,8 information Note 17

APPENDIX D
CHARGING PROCEDURES
Notes

[1]Survey is limited to those offenses generally denominated as felonies and serious misdemeanors or their equivalents.

[2]Does not include "presentments" or "impeachments"; neither have provisions relating to matters such as the militia, misdemeanors committed while in public office, been considered.

[3]The primary question considered is whether specific statutory language (assuming it would be fully descriptive of offense and sufficient for a charge) must be used in the formal charging document, or whether other language is allowed.

[4]A requirement similar to Fed.R.Crim.Proc. 7(c)(1) that the language used must be a "plain, concise and definite written statement of the essential facts constituting the offense charged."

[5]A requirement similar to Fed.R.Crim.Proc. 7(c)(1) that the charging document shall state "the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated."

[6]Contains a "harmless error" provision similar to Fed.R.Crim.Proc. 7(c)(3) that "error in the citation or its omission shall not be ground for dismissal of the [formal charging document] or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

[7]By leave of court only.

[8]A provision in language similar to Fed.R.Crim.Proc. 7(e) that the charging document may "be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

[9]Charge may be amended to conform to the evidence presented.

[10]Limited to amending charge to correct errors, mistakes, technical or formal defects and similar matters, but not matters of "substance."

[11]Defendant may consent to amendment.

[12]Indictment not amendable to add or change matters of "substance" without consent of grand jury.

[13]The language used must be sufficient to provide notice to the defendant of the offense charged.

[14]Precise language of statute is not necessary; other words conveying the same meaning may be used.

[15]Does not require leave of court.

[16]Upon the court's own motion.

[17]The express provision for amending particular charging documents without mention of the possibility of amending an indictment suggests that indictments cannot be amended, under the maxim of statutory construction "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another).

[18]The charge should be "substantially" in the language of the statute defining the offense or use "equivalent" language.

APPENDIX E

QUESTION -

POLICE: Have you or members of your staff voiced any complaints on the prosecutor's plea bargaining practices or policies? TOO MANY REDUCED CHARGES, TOO LENIENT SENTENCE RECOMMENDATIONS, TOO MANY DISMISSED CHARGES, NO INPUT, NO COMPLAINTS.

PROSECUTOR: Do you know of any complaints the police have voiced on any of your plea bargaining practices or policies? TOO MANY REDUCED CHARGES, TOO LENIENT SENTENCES . . .

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	PROSECUTOR
CALIFORNIA				
San Bernadino	No	Yes	-	Usually general
San Francisco	No	Yes	-	General
Alameda/Oakland	Yes, all categories	Occasionally	-	Too many dismissed charges
Santa Clara/San Jose	No	Yes	-	Too many reduced Chgs.& Lenient sent.
Riverside	Yes	Yes	General complaints	General
COLORADO				
Jefferson	No Response	No Response	-	-
CONNECTICUT				
Litchfield	No	No	-	-
FLORIDA				
Palm Beach	Minimal	Yes	Usually from officer level	General
GEORGIA				
Muscogee/Columbus	No	Yes	-	On cases not being handled properly
INDIANA				
Vigo/Terre Haute	Yes	No	Every officer has on way D.A. conducts law	-
LaPorte	Yes	No	-	-
Lake/Crown Pt.	Yes	Yes	General	Not in favor of Plea. Barg.but not opposed.Too many dismissed charges.
IOWA				
Scott/Davenport	Yes	Yes	-	General
LOUISIANA				
Caddo	No	Yes	-	Too many reduced chgs & lenient sent.
MAINE				
York	Yes	Yes	With previous D.A. too lenient sent.	Each category
MARYLAND				
Cumberland	Yes	No	Too many reduced charges	-

APPENDIX E Telephone Survey Results Regarding Police Complaints About Plea Bargaining (Continued)

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	MISCELLANEOUS COMMENTS MADE BY: PROSECUTOR
MASSACHUSETTS				
Norfolk	No	Yes	Only at Supreme Court level.	Too many red. chgs. Too lenient sent.
Worcester	Yes	Yes	Only when officer feels no plea should take place	General feeling of too many red. chgs. Too lenient sent.
MICHIGAN				
Genesee/Flint	Yes	No comments	Couldn't narrow	Change in Admin.
Kent City	Yes	No	-	Would like to see more plea barg.
Ottawa Beach	Yes	No	All categories	-
MINNESOTA				
St. Louis/Duluth	No	Yes	-	Reduced charges Light sentences
NEW JERSEY				
Monmouth/Freehold	No	No	-	-
NEW YORK				
Orange Co.	No	Yes	-	Cases are plea barg. when off. thinks it shouldn't be.
Erie	Yes	Yes	D.A. does not consult with pol. off. first	General
NORTH CAROLINA				
Wake/Raleigh	Yes	Yes	Too many reduced chgs.	General
Mecklenburg/Charlotte	No	Yes	-	Because of lack of understanding of P.B. process
OHIO				
Clark	Yes	No	In municipal ct. reduction of chgs. (no set standard)	-
OREGON				
Clackamas	Yes	Yes	All categories "Violation of law should be charged as such."	General
PENNSYLVANIA				
Philadelphia	Yes	No	Only in part	-

APPENDIX E Telephone Survey Results Regarding Police Complaints About Plea Bargaining (Continued)

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	MISCELLANEOUS COMMENTS MADE BY: PROSECUTOR
PENNSYLVANIA (cont.)				
Lackawanna	No	No	-	-
Lehigh	Yes	Yes	Too many reduced charges	General
TENNESSEE				
Sullivan/Kingsport	No	Yes	-	General
TEXAS				
Nueces/Corpus Christi	No	No	-	-
Marion/Lubbock	No	Yes	-	Only in one incident
Jefferson	No	No	-	-
Brazoria-Angleton	No	No Response	-	-
McCellard-Selby Co.	Couldn't answer	Yes	-	General (all categories)
VIRGINIA				
Newport News	Yes	Yes	Too lenient sentences	On individual case basis
Norfolk	No	No	-	-
WISCONSIN				
Waukeskaw	No	No	-	-

APPENDIX F

QUESTION
POLICE: Are the police regularly informed when cases are dismissed? Pled? or go to Trial?

PROSECUTOR: Do you regularly inform the police when cases are dismissed? Pled? or go to Trial?

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	PROSECUTOR
CALIFORNIA				
San Bernardino	Yes	No	Through written form.	Felony judgments published in local newspaper.
San Francisco	Yes	No	-	-
Alameda/Oakland	No	Yes	-	Reports of case disp. sent to Chief
Santa Clara/San Jose	Yes	Yes	In major cases.	Through liaison off
Riverside	Yes	Yes	In major cases	-
COLORADO				
Jefferson	No Response	No Response	-	-
CONNECTICUT				
Litchfield	Yes	No	Through disp. calendar	-
FLORIDA				
Plam Beach	Yes	Yes	-	-
GEORGIA				
Muscogee/Columbus	Yes	No	-	-
INDIANA				
Vigo/Terre Haute	No	No	Unless read in newspaper.	Only when P.O. is victim.
LaPorte	Yes	Yes	-	-
Lake/Crown Pt.	Yes	Yes	-	P.O. usually present.
IOWA				
Scott/Davenport	Yes	Yes	But not immediately - long after	Only when police needed for trial.
LOUISIANA				
Caddo	Yes	Yes	-	-
MAINE				
York	Yes	Yes	-	-
MARYLAND				
Cumberland	Yes	Yes	95% of cases	-
MASSACHUSETTS				
Norfolk	Yes	Yes	-	-
Worcester	Yes	Yes	-	-

APPENDIX F Telephone Survey Results Regarding Case Disposition Feedback From Prosecutors to Police (Continued)

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	PROSECUTOR
MICHIGAN				
Genesee/Flint	Yes	50% of time	-	-
Kent City	Yes	Yes	-	-
Ottawa Beach	No	Yes	Not regularly	-
MINNESOTA				
St. Louis/Duluth	Tes	Yes	-	-
NEW JERSEY				
Monmouth/Freehold	Yes	Yes	-	-
NEW YORK				
Orange County	Yes	Yes	-	-
Erie	No	Yes	Only when off.. is in court	-
NORTH CAROLINA				
Wake/Raleigh	No	No	-	-
Mecklenburg/Charlotte	Yes	No	-	-
OHIO				
Clark	Yes	No	-	No established prodecure, case by case basis.
OREGON				
Clackamas	Yes	Yes	-	Not when pled.
PENNSYLVANIA				
Philadelphia	Yes	Yes	Through IBM sheet	-
Lackawanna	Yes	Yes	-	-
Lehigh	Yes	Yes	Depends on case.	-
TENNESSEE				
Sullivan/Kingsport	Yes	Yes	Through disposition form	-
TEXAS				
Nueces/Corpus Christi	Yes	Yes	Through court coordinating system	Through invest. off.
Marion/Lubbock	Yes	Yes	Disposition sheet	Monthly Disp. form
Jefferson	Yes	No	Docket sheets	-
Brazoria-Angleton	Yes	No Data	-	-
McCellard-Shelby Co.	Couldn't answer	Not regularly	-	-

APPENDIX F Telephone Survey Results Regarding Case Disposition Feedback From Prosecutor to Police (Continued)

JURISDICTION	POLICE RESPONSE	PROSECUTOR RESPONSE	MISCELLANEOUS COMMENTS MADE BY: POLICE	PROSECUTOR
VIRGINIA				
Neport News	Yes	Yes	Daily report.	Disposition sheets.
Norfolk	Yes	No	-	-
WISCONSIN				
Waukeskaw	Yes	Yes	Through clerk of court.	

APPENDIX G

CHARACTERISTICS OF SIMULATED JURISDICTION
(A copy of this may be handed to Respondent in the Plea Bargaining Simulation)
In this jurisdiction the following conditions prevail:

(1) Prosecutors are permitted to present to the court plea agreements involving charge reductions and dismissals and sentence recommendations.
(2) These agreements are generally followed by the judges.
(3) Time served in pretrial custody is always deducted from sentences imposed.
(4) There are no mandatory sentences for repeat or habitual offenders.
(5) Any motions in a case are heard immediately prior to trial.
(6) No offenses are impeachable convictions.
(7) There is an individual (vs. a master calendar) system of case docketing. Every judge gets an equal share of the caseload and is responsible for disposing of it himself.
(8) There is a 90-day speed trial rule.
(9) There is no youth corrections act.

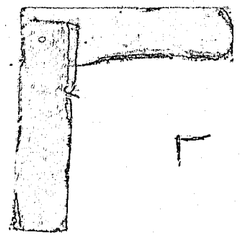
Appendix H

Robbery Case Information

Descriptive Title		Unit of Information
Introductory Statement	A	You are a senior police officer. The prosecutor has come to you for your views regarding a plea negotiation in which he is involved. The defendant is charged with armed robbery. The defendant is willing to plead guilty for a consideration. Assume that the law in this hypothetical jurisdiction provides the following penalties: Armed robbery is up to 30 years.
	B.	You are a senior prosecutor when a junior prosecutor has come for advice [The rest of the statement is the same as A.]
Defendant's race/ethnic/ nationality	1.	White, American, U.S.
Defendant's age	2.	Twenty-five years old.
Defendant's sex	3.	Male.
Basic facts of the case	4.	At 2:30 p.m. on a Saturday in a mixed residential commercial area, the defendant accosted a male, age nineteen, with a knife and demanded money. The victim gave him his wallet, which contained one ten-dollar bill, his student identification card, and two credit cards. Minutes later a passing police patrol car was summoned by the victim, who gave a description of the defendant. Approximately fifteen minutes, after the offense, the defendant was arrested several blocks from the scene of the crime. The victim identified the defendant as the robber.
Length of time since arrest in instant case	40.	Defendant was arrested two and a half months ago.
Defendant's intelligence and education	7.	Normal intelligence. High school graduate. No college. School record is unremarkable. No record of disciplinary problems.
Defendant's employment status	8.	Defendant is currently employed as a machine operator for local ceramic manufacturing plant. Defendant has held this position for six months. Defendant's record shows ten jobs as machine operator in light to heavy industry over last five years, interspersed with periods of unemployment. Usually defendant leaves rather than being fired.
Defendant's psychiatric problems.	9.	None.
Criminal history of defendant's family	10.	None.
Codefendents	11.	None.
Trial judge's reputation for leniency	12.	The trial judge is known to be lenient and considers probation in this type of case. He generally favors rehabilitative alternatives to incarceration.
Public and community sentiment	13.	Community sentiment against robbery is pretty strong; however, this case has received no publicity or press coverage.
Propriety of police conduct after arrest	14.	Not an issue.

Descriptive Title	*Unit of Information*
Evidence—substance of available	15. Police arrested defendant fifteen minutes after and seven blocks from scene of offense based on the following description: "White male, 19-25 yrs. of age, green checked pants." The defendant matched that description. The victim made an identification of the defendant at the scene of the crime (approx. 3:00 *P.M.*, one-half hour after offense). He said he remembered a small (one-half inch) scar on the defendant's right cheek, as well as the general contours and shape of the defendant's face. Victim's identification and credit cards were found five feet from defendant at scene of arrest and the defendant did have sixteen dollars in cash on him, including one ten-dollar bill. It was not fingerprinted. Victim's wallet was not recovered. No weapons were found. There are no other witnesses to the crime.
Evidence—substance of available	42. Police arrested defendant fifteen minutes after and seven blocks from scene of offense, based on the following description provided by victim: "White male, 19-25 yrs. of age." The defendant matched that description. The prosecutor conducted a followup interview with the victim. He was only able to add to the description that the defendant was the right weight and height. At scene of crime (approx. 3:00 *P.M.*, one-half hour after offense), the victim said he was "sure that was the guy." But at an interview last week, he said that the crime "happened so fast" that the victim couldn't be absolutely sure. It was ascertained that the victim was not contacted or pressured by defense counsel or the defendant. The defendant did have sixteen dollars in cash on him, including one ten-dollar bill. It was not fingerprinted. Victim's wallet was not recovered. No weapons were found. There are no other witnesses to the crime.
Date of trial in instant offense and probability of continuance	16. The case is scheduled for trial in seven days. It is unlikely the judge will grant a continuance.
Backlog of docket of judge	17. This judge is an efficient administrator and is always current on the calendar. There is no backlog.
Available alternatives to incarceration	18. (1) Probation; (2) Work-release; (3) Vocational rehabilitation programs; (4) Military service; (5) Psychiatric/family counseling; (6) Diversion; (7) Restitution.
Pretrial release status for this robbery	19. Defendant is currently released on his own recognizance.
Police attitude toward proposed bargain	20. Police are generally opposed to plea-bargaining. They are particularly concerned with street crime. Beyond this, the arresting police officers have no attitudes specifically related to this case.
Defendant's account of incident	21. Defendant claims he is innocent, that it is case of mistaken identity. He said he was out walking for pleasure and was not at the scene of the crime.
Effectiveness of witnesses at trial	22. A. The victim is an art major specializing in sculpture and

Descriptive Title	*Unit of Information*
Effectiveness of witnesses at trial (cont.)	photography of the human body and face. He has never testified at a trial before and is a little uncomfortable about taking the stand. B. The arresting police officer is a five-year veteran with much experience as a witness and comes across well on the stand.
Defense counsel reputation	23. A recent law school graduate who has been defending criminal cases for seven months. She is extremely aggressive; however, several of your fellow prosecutors have found that a reasonable plea negotiation can be accomplished. Her preparation is generally excellent, and her courtroom presentation is generally adequate.
Reputation of prosecutor	23. A recent law school graduate who has been prosecuting criminal cases for seven months. She is extremely aggressive; however, several of your fellow defense counsel have found that a reasonable negotiation can be accomplished. Her preparation is generally excellent, and her courtroom presentation is generally adequate.
Defendant's prior record and reputation	41. Arrests and dispositions: (1) One juvenile contact at age fourteen for malicious mischief, disposition unknown. (2) One arrest at age eighteen for disorderly conduct, dismissed. Reputation: Police do not know defendant.
Defendant's prior record and reputation	5. Arrests and dispositions: (1) Three juvenile contacts,* one at age fourteen for assault, two at age sixteen, both for unlawful entry; disposition



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