THE PROSECUTOR'S CHARGING DECISION:

A POLICY PERSPECTIVE

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
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The Prosecutor's Charging Decision: A Policy Perspective

By
JOAN E. JACOBY

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FOREWORD

Some form of pre-trial screening is practiced in many prosecutors' offices, generally for the purpose of weeding out legally insufficient cases before they enter the criminal justice process and create unnecessary work. Pre-trial screening can also be a vehicle for articulating and carrying out prosecutorial policy. As this study found, however, the screening process is only rarely used for this important function.

The report suggests that pre-trial screening and charging procedures must be set clearly within a policy context. The prosecutor should decide and articulate his objectives, for office policy profoundly affects case dispositions, and these in turn affect the courts, corrections, and the community.

Four distinct policies, identified by a previous Institute-sponsored survey of pre-trial screening projects, are examined to show how they affect the use of such strategies as diversion, discovery, and plea bargaining.

Most important, the report demonstrates that the performance of a prosecutor's office cannot be accurately assessed until the policy—and hence the goals—are understood. The need now is for quantitative tools and procedures to measure how closely case dispositions match the policy goals.

GERALD M. CAPLAN,
Director, National Institute of Law Enforcement and Criminal Justice.

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PREFACE

Pretrial screening has been acclaimed as an operating program that provides great economies to the prosecutor and other agencies in the criminal justice system. Various rules, regulations, standards and procedures have been promulgated to implement screening. Each type carries a common appeal for uniformity and consistency in making charging decisions—even though tools and procedures to support the effort are not adequate.

This prescriptive package, unlike previous reports, does not attempt to prescribe procedures and operations for a prosecutor to follow in setting up a pretrial screening unit or to itemize the elements that should be considered in the charging decision. Rather, it examines charging from a policy perspective. It will show that initial charging decisions have a direct impact on the operations of the office; that charging decisions are made with reference to office policy; and that office policy profoundly affects the ways in which cases are disposed. Four policy types were identified through on-site visits to prosecutors' offices. They are examined here to show how the use of such strategies as diversion, discovery and plea bargaining differ according to the policy and how resources in the office can be rationally distributed. Most importantly, this report shows that the performance of the prosecutor's office cannot be judged until we know what it hopes to achieve.

The prescriptive package is designed for the prosecutor in his role as chief policy maker in the office as well as for the recipients of his delegated authority: the first assistant, chief of criminal trials and the head of intake. The purpose of the package is to sensitize them to the issues involved, the effect of charging decisions and the requirements for uniformity and consistency in decisionmaking. By viewing the charging decision from a policy perspective as the first determination in a prosecutorial decisionmaking process, we hope to add a new dimension to the importance of pretrial screening.

This work is based generally on the cumulative knowledge and experience gained by the author as Executive Director of the National Center for Prosecution Management. It is a direct result of a Phase I Evaluation of Pretrial Screening conducted by the author for LEAA at the Bureau of Social Science Research. The results of this study were summarized in a series of Phase I reports. They have been expanded and detailed into this prescriptive package. However, this package does not represent the final examination of the issues, procedures and practices in pretrial screening. In fact, it points up the critical need for further information and the verification of some of the conclusions presented here. As such, this prescriptive package represents the current state of our knowledge. Hopefully, it will be succeeded by many more packages as we improve and expand our research and information.

I would like to express my gratitude to some of the people who made this report possible. The professional staff of LEAA's National Institute of Law Enforcement and Criminal Justice provided immeasurable help and encouragement. Special thanks belong to Carolyn Burstein, my project monitor, who established a level of excellence that was sometimes difficult to meet. Also my gratitude is extended to Dr. Richard Barnes, Cheryl Martorana and Carla Kane. This type of work cannot be performed

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I will welcome your comments and opinions and hope that this report will be of some assistance to prosecutors throughout the United States.

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CHAPTER I. PRETRIAL SCREENING—BACKGROUND AND ISSUES

A. Introduction

The potential power and significance of the role of the American local prosecutor is derived from his many areas of activity. As an official of the state, upholding the laws and constitution of the state, he is responsible for recommending legislative improvements. As an interpreter of the law by using discretionary power he influences the quality of criminal justice. Finally, as a locally elected official, he is provided with an independent source of power that supports a role of policy maker, influencing the very fabric of the social and economic systems in his community.

The wide discretionary power utilized in these prosecutorial activities including the ability to determine whether or not to initiate criminal proceedings and once underway, to change the penalties from what the law might otherwise provide, has subjected the prosecutor to criticism and surrounded the function with controversy. Probably the most pervasive criticism has been a lack of outside review or external control over the decision-making function and a concern over inconsistencies in the charging decisions. These issues are important ones. They have been discussed from a variety of perspectives [1] and will be also in this report.

Before attempting to respond to the issues surrounding discretionary power and the charging authority of the prosecutor, we need first an understanding of the environment within which the prosecutor works, how it affects his operations and to a degree, shapes his policy.

B. Background

Each prosecutor's office must operate within an external environment. Before any examination is made of the prosecution function, distinction must be made between what the prosecutor can be held accountable for and what is a response to an environment over which he has little or no control. The external environment can be described by four major factors [2] that influence both the mandatory and discretionary activities of the prosecutor. These are: (1) the characteristics of the community or jurisdiction, (2) the workload, (3) the judicial system and (4) the resources available to the office. The prosecutor can do little about the geographic, demographic or socio-economic character of the community that he represents. Yet the character of the community bounds, constrains and determines the work and to an extent, the policy of the prosecutor. From a geographic and demographic perspective, the overwhelming majority of local prosecutors function in rural communities or small towns. According to the NCPM survey [3] 76% of all prosecutors represent jurisdictions with populations of less than 100,000. The NAAG [4] survey indicates that "the median population served by county prosecutors is between 20,000 and 30,000 persons and that of district attorneys, between 60,000 and 100,000." The essentially rural nature of the prosecutor's environment is supported also by the fact that 74% of the prosecutors are either performing their duties as "one person" offices or with less than four assistants. Based on these figures, it can be easily understood that the stereotypes formed about the urban prosecutor and his environment reflect a minority and do not necessarily apply to the majority of rural or small town prosecutors. The demands for prosecutorial services in a rural community cannot be equated with the demands arising from an urban metropolitan area. Similarly, the socio-economic characteristics of the community shape the work and the policy of the prosecutor. A blue collar, working class community expects a different law enforcement pattern than an affluent, professional or white collar community.

[1] For an extensive bibliography on this subject see *Prosecutorial Discretion: The Decision to Charge. An Annotated Bibliography.* W. Randolph Teslik, National Criminal Justice Reference Service, LEAA, October, 1975.

[2] For detailed discussion of these factors see *First Annual Report of The National Center for Prosecution Management*, Joan E. Jacoby, Washington, D.C., 1973.

[3] The results of a 1972 survey conducted by the National Center for Prosecution Management and published in the First Annual Report.

[4] The results of four years of research conducted by the National Association of Attorneys General, Committee on the Office of Attorney General and published in *The Prosecution Function: Local Prosecutors and the Attorney General*, 1974.

Other constraints in the prosecutor's environment are inherent in the operation of the criminal justice system itself. Situated between the police and the courts in the processing system, the prosecutor has little control over the amount and type of work sent to his office. State laws and local ordinances define crime, and what crimes are to be prosecuted within his jurisdiction. The volume of crime in the community directly determines the volume of work in the prosecutor's office. Even police arrest policies have direct bearing on the amount and type of work presented for prosecution. An active enforcement of drug abuse laws in one jurisdiction, for example, will produce a vastly different workload than that resulting from a policy of limited enforcement. As the amount of crime affects the prosecutor's caseload, the quality of the law enforcement activity affects the workload. Poorly prepared police reports, incomplete investigations, lengthy delays in receiving information, all contribute to additional work in the prosecutor's office.

Although a member of the executive branch of government,[5] the prosecutor works daily within the environment of a judicial system established and operating independently of his control, but not necessarily of his influence. The prosecutor is bound by court rules and procedures to which he must adapt. Whether these are responses to different types of docket control, assignment of cases, scheduling of motions and hearings, or even the actual organization of the court, e.g., the number of judges "sitting criminal," under all these conditions, the prosecutor's responses are limited.

Finally, the prosecutor has limited control over the resources available to his office. Even these may be limited to local appropriating policies and priorities, the economy or the supply of legal talent. Six out of ten offices surveyed in 1972 received 90% or more of their funds from the county government. As a locally-funded public official, it is obvious that the prosecutor's policies, often dependent on resources, are defined by policies and priorities of the appropriating agency, usually the county Board of Commissioners. In periods of fiscal restraint, not only may innovative programs such as victim-witness accommodation units or consumer fraud units be shelved, but even the request for an electric typewriter be denied to the one person prosecutor's office along with a request for partial compensation for the secretary. Yet crime alone does not necessarily represent the sum of the prosecutor's work. Other matters compete for his resources and tap his discretionary authority. In 1972, 75% of prosecutor offices represented their jurisdiction in civil matters; 93% handled nonsupport cases; 82%, juvenile matters; 54%, family and domestic relations; 75%, consumer protection; 79%, environmental protection.

Thus the activities of the prosecutor are strongly influenced by the external environment. In fact the research conducted by the National Center for Prosecution Management has shown that the effect of these and other environmental factors is so forceful that they must be considered in any study of the activities of the prosecutor. This does not mean that similar external environments produce similar prosecutorial practices. On the contrary, *it is our thesis that variations in the response to similar environments can be attributed almost solely to variations in prosecutorial policy. After all the external factors are taken into account, prosecutorial policy becomes the single most important factor to be considered in the examination of the discretionary activities of prosecutors.* Moreover, a lack of policy, demonstrated by an intentional or even unintentional failure to exercise discretionary options, is just as important in determining the operations of the office and the outcome of pretrial screening as a tightly reasoned and broadly publicized policy.

The chief prosecutor's policy and the strategies used to implement it can be identified and measured by observing those areas that are under prosecutorial control. The first area, the discretionary power of the prosecutor, as first used in the charging process, sets the tone, tenor, quality and quantity of cases moving through the criminal justice system. The prosecutor has the option of rejecting a case, accepting a case at a given seriousness level or diverting the case to other criminal justice systems or noncriminal treatment programs. The decisions made at this point indicate the prosecutor's policy which, in turn, reflect the character of the community and its expectations for law enforcement.

The second area of discretion pertains to the way in which both personnel and fiscal resources are used. This significantly affects the type and quality of prosecution in a jurisdiction. Work must be distributed on a rational and selective basis, taking into account not only the resources of the prosecutor but his priorities as well. For example, it is almost universally expected that the toughest cases will be assigned to the most experienced lawyers, and those cases ranking the high-

[5] Except in Louisiana and Connecticut where the prosecutor is a member of the judicial branch.

est in prosecutorial interest will receive the additional support necessary to conclude them satisfactorily. In those situations where the operations of an office are conducted with limited resources (e.g., few experienced personnel), it is all the more important that policy and priorities be established to rationally distribute the work and maximize the opportunities for favorable dispositions.

Finally, the prosecutor's participation in making recommendations at sentencing must be recognized as another means of expressing policy and priorities. This post-trial activity occurs when the prosecutor recommends to the judge or the jury what the sentence should be. The recommendation is based on the prosecutor's knowledge of the defendant, his background, the seriousness of the offense and the risk presented by the defendant to the community. Not all prosecutors use this power. In some instances, this is by choice; in others, it is precluded by the court, legislation or tradition. Where sentence recommendation is used, however, it can be considered as completing the cycle of prosecutorial discretion by ensuring that the sentence is properly consistent with the charging decision.

Even though these three areas under prosecution control are often examined separately, they are in fact intertwined. This report will focus on the first area of the prosecutor's discretionary power, the charging or the pretrial screening function,[6] and will demonstrate that the whole prosecutorial decisionmaking process is governed by the initial decision made at this point. Because the prosecutor is dependent upon sources other than his own department for information concerning criminal behavior, e.g., police, detectives, and bureaus of criminal investigation, it is imperative that careful case review take place and that it be within specific policy guidelines. In this regard, the prosecutor who uses the available information for careful and considered review provides a better service to his constituents than does the prosecutor who abdicates this authority.

[6] Pretrial screening is defined as the process whereby a prosecuting attorney examines the facts of a situation presented to him for prosecution, and then exercises his discretion to determine what charging action, if any, should be taken.

The widespread use and acceptance of the word "screening" to describe the intake, review and charging process is an unfortunate one since it implies the more negative connotation of filtering or rejecting rather than reviewing, examining and decisionmaking. With this distinction in mind, the word "screening" will be used in this report but in the context of its broadest meaning.

This report is directed to the prosecutor, the first assistant and the charging assistants. It reflects the present state of our knowledge about the effect of charging decisions on the prosecution process and the criminal justice system as well. It will show the impact of prosecutorial policy on dispositions, identify strategies useful in implementing policy and give examples of types of personnel utilization patterns that support the prosecutor's goals. The report is directed to the chief prosecutor because it hopes to sensitize him to the importance of his policy particularly as it affects dispositions, and the criminal justice system, and as it reflects the Community's expectations. It also will provide a description of various types of policies that have been observed in operation, so that each prosecutor can examine them for validity and practicality for their individual communities. The first assistant is a valued audience. In his hands rests the responsibility for the operations of the entire office. As such, the integration of the screening function into the entire office, the assurance that the prosecutor's goals are being consistenly followed throughout the entire decisionmaking process, and the marshalling of all the prosecutorial resources and strategies to accomplish these goals are critical responsibilities. At the charging level, the assistant in charge and the decisionmakers themselves are addressed in this report to point up the need for and importance of uniformity, guidelines, review and control.

This report should not be considered the final, definitive answer to the issues surrounding the prosecutor's discretionary authority, policy or decisionmaking. It merely sets the stage for further work, calling for new knowledge and examining the implications of this knowledge. To move to this stage, however, it is first necessary to explore the issues that surround this controversial process called "screening."

C. Issues

1. *Introduction.* Pretrial screening is an intake and review procedure, whereby the prosecutor or his assistants attempts to determine, based upon information given them by law enforcement agencies, what type of action should be taken with regard to a particular case. The importance of pretrial screening is demonstrated by the fact that the charging decision is made to reflect the prosecutor's judgment of the quality of evidence in the case at this stage, and his evaluation of the probability of completing the prosecution successfully. The pretrial screening process attempts to minimize

capricious decisionmaking by following either explicit rules or policy guidelines.

The basic goal of pretrial screening is to insure uniformity of charging that is consistent with prosecutorial policy. While policy may differ from one office to another, the basic needs for consistency and uniformity prevail. Since the charging decisions are the first expression of prosecutorial policy, they must be consistent with what the chief prosecutor hopes to achieve and made uniform by the charging assistants. Arbitrary and capricious decisions can be made by assistants if the prosecutor's policy is not clearly stated and if means are not developed for internal review by those ultimately responsible for the decisions reached. Pretrial screening is not solely a rejection device. It is the "gatekeeper" for the office. The results of the decisions made at screening can be seen throughout the entire prosecutive system. By filing or failing to file a charge in a particular case or type of cases, the prosecutor signals other elements of the criminal justice system of his basic orientation and policy.

To institute pretrial screening as a program requires that a policy be established. Once established, the policy preferences largely determine how the program will actually operate in terms of the final disposition of the cases in the criminal justice system and the dominant routings to those final dispositions. They also set the need for insuring a uniform system of charging. Miller, in discussing the charging decision states that the goal of intake and review is "to insure uniformity in charging both in its evidence-sufficiency and policy aspects. . . ." [7] This means that uniformity in charging is based on the successful translation of the prosecutor's policy guidelines into appropriate decisions for each case reviewed. In that sense, uniformity of charging and staff accountability are dependent upon the prosecutor's policy guidelines.

It can therefore be seen that the principal purposes of pretrial screening are not merely to remove from the caseload those cases that would not meet the test of probable cause or to eliminate arbitrary decisionmaking from the process. It is also the first step in the translation of prosecutorial preference to the ultimate disposition of a case. To understand the importance of this perspective, a review will be performed of the expert knowledge on pretrial screening in terms of a set of issues directly affecting the pretrial screening process.[8] The issues cover the following areas:

- the definition of screening,
- an examination of decisionmaking, procedures or operations that determine the way pretrial screening functions in an office, and
- the administrative means by which procedures are institutionalized and monitored within the office.

By looking at the issues in terms of this schema one can determine the scope of the pretrial screening function and assess its influence on the criminal justice system.

2. *Defining pretrial screening.* The literature on pretrial screening is dominated by one theme—procedures for reaching charging decisions and the effectiveness of pretrial screening for reducing court loads. In part, this emphasis seems to have arisen from a failure to consider the place of pretrial screening in the broader context of the prosecutive system and the criminal justice system and to explore its relationship with and effects on other elements of these systems. It is our belief that pretrial screening programs may be better understood by:

- examining pretrial screening as a process;
- attempting to describe the stages in that process;
- noting the diversity of outcomes permitted by pretrial screening; and
- observing the various effects of pretrial screening on elements of the criminal justice system other than simply the relationship between the prosecutor's office and the judicial system.

Pretrial screening is a process which extends over time, and operates in conjunction with other elements in the criminal justice system, law enforcement agencies, judges, and correctional officials, among others. In this context it becomes important to examine the decisions to charge or not charge, to divert or to refer in terms of the effects that decision has on other elements of the system and, conversely, to consider influences other elements of the system are likely to have on the charging decision. The definitions of screening which appear in the literature are deficient in not considering the elements making up the screening function such as the type of information presented to the

[7] Frank W. Miller, *Prosecution: The Decision to Charge a Suspect With a Crime* (Boston: Little, Brown and Company, 1969), p. 16.

[8] The discussion presented here is largely based on a review of books and articles. Other sources consulted include representatives of the American Bar Association, National District Attorneys Association, National Association of Attorneys General, legal and social science scholars, and selected reports from operating pretrial screening programs.

prosecutor, the actors involved in the reviewing procedure, the stages of review, and the variety of outcomes which might be expected, that is, many of the internal variables which affect the way a system would operate and all the external variables which impact upon the decisionmaking process. The more limited view of pretrial screening which is evident in the literature on prosecution is not necessarily a function of the authors' failures to comprehend charging, but a failure to comprehend the importance of intake and review as a process which functions over time and in relation to other processes operating simultaneously, e.g., the police, courts and corrections. Examples of this examination of pretrial screening as an isolated event are apparent in several major sources in the literature.

Kenneth Culp Davis sees discretion, or the means used in the decision to charge, as an opportunity to determine what charges would be desirable under the circumstances after the facts and the law are reviewed.[9]

> Brian A. Grosman, quoting Roscoe Pound, states that discretion is an "authority conferred by law to act in certain conditions or situations in accordance with an official's * * * considered judgment and conscience.".[10]

Neither definition or subsequent discussion considers the impact of the use of discretion on anything other than the official making the decision or the fact that decisions require inputs from other components in the criminal justice system. For example, the quality of police reporting, of judicial sentencing, and of prisons' abilities to rehabilitate criminals will affect the prosecutor's decisions as to what types of criminal behavior to prosecute. In addition, both definitions are inadequate since neither places limits on the locus of these discretionary powers nor yields an unambiguous basis for evaluations of their use. They also fail to account for the various ways in which discretion may be used and for most of the internal and all of the external variables which affect the decisionmaking process.

Lewis R. Katz expands the definition somewhat to include consideration of the level of charge to be made, as well as the decision whether to charge or not which he says occurs by evaluation of the evidence in terms of the law. He also notes that, because the facts are often not exact, the prosecutor must use his "judgment" as to what charge would be most correct.[11] This definition, though drawing our attention to problems inherent in law enforcement reporting, also fails to provide any suggestions on how to carry out the process.

Frank W. Miller appears to give the concept of charging the most serious consideration. Substantially agreeing with the above definitions, Miller directs his attention to the options in the actual operation of the pretrial review procedure. He states,

> Three principal methods might be utilized. * * * The most obvious one would be as complete as possible an examination and evaluation of evidence available at the time the charging decision must be made. A second would be the establishment of intra-office review procedures, and a third the development of specialists within the office or reliance on specialists in other departments.[12]

In our view, the Miller definition is important because it reflects several key and fundamental elements in the decisionmaking process. The first is a concern with the set of information available to the prosecutor or his assistant. For a proper decision to be made, the information presented to the prosecutor must be complete and accurate; thus the quality of the information entering the prosecutor's office will clearly impact upon the charging decision. Because prosecutors will often have more than one law enforcement agency reporting to them the method of reporting and quality of reports are likely to vary. Thus it becomes relevant to consider how variations in the quality of information by various sources are weighed by prosecutors. One might ask whether all of the information is considered or whether some information is immediately discounted and, if the latter is the case, what the bases are on which some data sources are given greater credence than others. Looking to future activities of the pretrial screening project, it then becomes important to consider whether individual prosecutors systematically discount some sources and whether there is implicit agreement among prosecutors or classes of prosecutors about which sources are less reliable or credible.

Another area neglected in most explications of the pretrial screening process is that of the degree to which policy regarding various aspects of the process has been articulated and publicized as appropriate operational guidelines for the staff. Little attention has been given

[9] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Chicago: University of Illinois Press, 1973), p. 25.

[10] Roscoe Pound, "Discretion, Dispensation and Mitigation: The problem of the Individual Special Case," 35 *New York University Law Review* 925 (1960), p. 926, quoted in Grosman, p. 31.

[11] Lewis R. Katz, *Justice is the Crime: Pretrial Delay in Felony Cases* (Cleveland: The Press of Case Western Reserve University, 1972) p. 73.

[12] Miller, p. 16.

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to the extent to which evaluative standards have been developed to allow prosecutors or others to conduct administrative reviews. Without these tools it is difficult, if not impossible, to determine whether policy objectives are being obtained and, if not, the location and reasons for shortfalls.

President Ford, in a statement to Congress, noted:

> * * * prosecutors all too often lack efficient systems to monitor the status of the numerous cases they handle. If improved management techniques could be made available to prosecutors, the likelihood of swift and sure punishment would be substantially increased.[13]

The same need for monitoring charging decisions and case dispositions is obvious, if the goal of pretrial screening is also to assure uniformity of, and hence accountability for, charging decisions.

Finally, the presence of either specialists in a particular area of prosecution, or generally experienced assistant prosecutors in the intake and review section is likely to insure greater knowledge from which to judge the merits of a case. The familiarity of these assistants with the office is also likely to result in familiarity with the prosecutor's policy and in turn aid the prosecutor in his attempts to carry that policy forward.

Nonetheless, the inclusion of the above elements still does not provide a complete definition. Included should be those elements in screening which reflect the policy of the office and contribute to the decisionmaking process. What must be included in any definition of screening are notions of policy without which no program can function; operations, or the means by which a program is carried out; and controls, or the technique by which the prosecutor is able to insure that his policy is being enforced. In addition, in describing a system it is necessary to include those aspects of the intake and review process which impact upon the rest of the criminal justice system.

The ABA Standards[14] materially extend the basic conceptualization of Miller. Like Miller, the ABA recognizes that pretrial screening is a process which results in placing cases with sufficient evidence to support a conviction before the courts. However, the ABA Standards go further by directing attention to the charging decision itself in enumerating factors other than the weight of the evidence that have a bearing on pretrial screening decisions. These other considerations listed by the ABA include:

- the prosecutor's reasonable doubt that the accused is in fact guilty;
- the extent of the harm caused by the offense;
- the disproportion of the authorized punishment in relation to the particular offense or the offender;
- possible improper motives for a complainant;
- prolonged nonenforcement of a statute, with community acquiescence;
- reluctance of the victim to testify;
- cooperation of the accused in the apprehension or conviction of others; and
- availability and likelihood of prosecution by another jurisdiction.[15]

The ABA discussion explores various stages in making the decision to charge. But, essentially, it is a further elaboration of Miller's belief that for proper charging what is needed is a careful and rational review of the information available to the prosecutor. Thus, while the ABA has provided the prosecutor with a frame of reference in which to operate, it and the others still do not provide an adequate model from which one might plan a pretrial screening unit, institute that unit, and evaluate it. Furthermore, none of these descriptions provides an understanding of the impact screening might have on the broader criminal justice system.

In examining some of the literature on pretrial screening we found that the discussions focused on the dynamics of the screening process,[16] on the variations in application of the concept,[17] or on the analysis of ways in which pretrial screening options are channeled or constrained by other components in the criminal justice system.[18] Yet despite the covering of broad topic areas, none of the works surveyed presents a comprehensive description of the pretrial screening process. The reasons for this are that the literature has confined itself to a discussion of pretrial screening in ideal terms, without consideration for the reasons that certain events, as variations in pretrial screening programs, take place, and without regard for the multiplicity of both internal and external events which impact upon any decisionmaking process.

Most of the descriptions of pretrial screening have attempted to generalize the screening process and to

[13] Remarks of President Gerald R. Ford on Crime in the United States Before the U.S. Congress, June 19, 1975.

[14] American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* (approved draft) (New York: American Bar Association, 1971).

[15] Ibid., pp. 7–8.

[16] See ibid., Miller and Grosman.

[17] See Grosman and Davis.

[18] See Katz.

discuss discretionary elements involved, but none of the sources indicated a clear understanding of the dynamics of the process, nor offered a concise description of the process as it actually operates. Because the orientation of the authors emphasizes the outcomes of the pretrial screening procedure, several complex issues inherent in intake and review are avoided. For example, only minimal consideration is given to internal and external constraints which confront the prosecutor, while examination of the impact of screening on other components of the criminal justice system is nearly totally lacking. However, because of the diversity of perspectives used in the descriptions of pretrial screening, the writings of the authors surveyed do make a major contribution toward understanding the system and do provide a valuable point of departure for the elaboration of a more comprehensive analytical model.

Thus, we conclude that any adequate analytical model of the pretrial screening process must include the following:

- theoretical notions of discretion and charging as evidenced in the Pound and Davis definitions;
- recognition of types of decisions that will have to be made, by whom they will be made, how they will be made, and based upon what information;
- awareness of the various roles the prosecutor may adopt, (as, for example, an arm of the law enforcement agencies, an interpreter of the law or determiner of the way in which the law should be applied in a given situation, and as policymaker for the community);
- internal constraints for those aspects of his office over which the prosecutor has control (such as resource allocation, and office policies); and
- external constraints of his environment, or those aspects of the criminal justice system which limit or determine the capacity in which the prosecutor will function.

These factors, when properly articulated seem to provide the basic elements of a more comprehensive analytic model which may also be seen as a "working" definition, while at the same time retaining the theoretical insights of previous analysts of pretrial screening.

The remainder of this chapter will attempt to elaborate a preliminary analytical model of the pretrial screening process. The criticisms leveled against the authors reviewed above are not meant to detract from the value of their work but rather to indicate this author's perception of the need for more explicit elaboration of the analytic model implicit in their works.

3. *Practices affecting pretrial screening functions.* Three elements affect the outcome of pretrial screening. The first is the decision to charge, second is the limitations on the charging decision, and third is the prosecutor's control of and response to the environment. The decision to charge or not charge a defendant with commission of a crime is the result of pretrial review. The procedures or methods used in that review may be limited by such external factors as the quality of information, time to charging requirements and other discretionary forces. How the office responds by organizing and establishing procedures determines the ways in which control and accountability are insured for decisions and the impact the charging decision has on the rest of the process. While analytically distinct, these three elements are intertwined; decisions reflect the environment; and office procedures and administration reflects staffing, and so forth. Initially, however, we must look at them separately if we are to understand the workings of the pretrial screening process.

a. *The decision to charge.* The decision to charge or not charge a suspect with commission of a crime, and the level of charge made, represents the weighing of information available to the prosecutor against his policy. The prosecutor must make his decision based on the belief that:

- the individual is guilty;
- the prosecution of the case will result in a conviction;
- the effort made to prepare the case will result in conviction equal to the effort expended;
- the influence of public opinion will be in the prosecutor's favor;
- the resulting sentence will match the crime, and
- the jurors are not loathe to convict.[19]

Though the choices available to the prosecutor—

- to charge;
- not to charge;
- defer prosecution;
- divert; or
- return the case to the source of information for further investigation—[20]

[19] American Bar Association Project on Standards for Criminal Justice, p. 24.

[20] National Center for Prosecution Management, *The Prosecutor's Screening Function* (Chicago: National District Attorneys Association, 1973), p. 3.

appear simple and direct, the decision to charge is neither a simple one, nor one which stands autonomous from the rest of the criminal justice system. The selection of any of the choices available requires the prosecutor to be aware of the impact of such decisions on the system as a whole. The difficulty inherent in the decision to charge is seen in the following statement by Miller:

> Four problem situations are identifiable. In the first of them, either the evidence is insufficient to convince the prosecutor that the suspect is guilty, or to convince him that a jury would think so. In all of the other situations, the prosecutor is convinced that the suspect is guilty. In the second situation, the prosecutor realizes that he cannot surmount the preliminary examination, or that the case will fail at trial, because the evidence on which he bases his conclusion of guilt is not available to him at the preliminary examination or at the trial. In this situation * * * he will ordinarily decline to prosecute * * * [thus] the standard for determining evidence sufficiency is the probability of conviction in addition to the probability of guilt * * *.
>
> The third problem situation also posits evidence available to convince the prosecutor of the suspect's guilt. It differs from the second, however, in that the prosecutor has no reason to doubt that the jury will also believe [in the suspect's guilt]. But, in some situations juries, or even judges, will not convict. * * * Ordinarily prosecutors will not charge under these circumstances either.
>
> The final problem situation involves the traditional discretion of the prosecutor. Even though he is convinced of the guilt of the suspect * * * a prosecutor will decline the charge when he believes that prosecution is not in the community's interest. * * * In the latter two problem situations, the decision not to charge is based on factors unrelated to the ability of the prosecutor to convince the judge or jury of the fact that the suspect did the acts complained of * * * [21]

The charging choices and how they are used are a function of prosecutorial policy, and will, in part, determine the effectiveness of the criminal justice system. For this reason great attention must be directed toward this aspect of prosecution.

The approach taken by many of the authors discussing pretrial screening has been to view the charging decision in legal and professional terms.[22] *Yet the importance of accurate charging is not only to provide defendants with equal protection under the law, but to insure that a stated policy is carried out consistently, uniformly and with minimum delay.* Very little information has been provided on how one determines whether or not proper decisions are being made by assistants based upon the policy of the office. If we are to test for the accuracy and efficiency of the screening process, the charging decision must be examined in terms of the final disposition of the case and the prosecutor's policy.

If evaluation of the pretrial screening process is to be sensitive to the options open to prosecutors in their charging decisions as a means of effectively pursuing prosecutorial policy, accurate information on each outcome or disposition is needed. To determine the extent to which a given prosecutor's pretrial screening program is operating effectively requires the establishment of his goals, whether implicit or explicit. Since a variety of outcomes are desirable and "legitimate" depending upon the policy being followed, the effectiveness of pretrial screening cannot be determined until the preferences of the prosecutor are known.

b. *Limitations to charging decisions.* The procedural policies of a prosecutor's office, in general, and the way in which information is reviewed, in particular, will affect the ability of the criminal justice system as a whole to deal with certain types of criminal behavior. If Miller is correct in saying: "It remains true, however, that in the usual case, maximum efforts to scrutinize each piece of evidence carefully are not made," [23] then the decisionmaking and operations processes are not being used effectively. For screening to be effective the American Bar Association suggests that a clear and precise review of a case is required.[24]

In order to properly determine whether a suspect should be charged, and at what level, the prosecutor must have adequate information available to him. Grosman limits his discussion to information provided by the police: the facts of the case, and the arrest record or "rap sheet." [25] Miller includes interviews with witnesses, the victim and defendant; and reports from other criminal justice system components. He notes that the information sources generally available to the prosecutor when making his decision are the police of-

[21] Miller, pp. 27–28.

[22] See American Bar Association Project on Standards for Criminal Justice, and Miller.

[23] Miller, p. 16.

[24] American Bar Association Project on Standards for Criminal Justice, p. 27.

[25] Grosman, pp. 20–21.

ficer, the police report or summary of the alleged crime and occasionally witnesses, the suspect and the victim.[26] The presence of witnesses, the suspect and the victim at the time a case is reviewed is largely dependent on the prosecutor's preference or on the decision of the reporting police officer.[27] In some cases, but by no means routinely, reports of medical examiners, results of polygraph tests, physical evidence either of the crime or the condition of the victim are examined by the prosecutor.[28] Occasionally, defense attorneys are permitted to present arguments about the sufficiency of evidence and even to call the prosecutor's attention to additional evidence.[29]

Direct observation of intake procedures indicates that review of information in a clear and precise manner is not commonly taking place setting a basis for inaccurate charging decisions. Many factors contribute to this failing. In some jurisdictions, the court requires the prosecutor or his assistant to charge the defendant within one to three days after arrest. This time constraint limits access to additional information helpful to a proper charging decision. Some offices have difficulty obtaining information from the police, and even when that information is obtained its accuracy may be questioned. Those offices that have the apparent ability to review cases carefully before charging generally obtain good information easily, and have ample time (ten or more days) in which to make decisions. Nonetheless, even those offices receiving less complete information and required to charge within 24 hours could improve their situation by increasing staff size, improving communications, training with the law enforcement agencies supplying the information or by more effectively allocating resources to the intake and review section.

In addition to the information available and time limit requirements, pretrial screening is also affected by the use of discretion elsewhere in the system. Since the presence or absence of information to some extent implies the cooperation of persons outside the prosecutor's office, their power, influence, and related behavior become relevant to the operations of the pretrial decisionmaking process. The extent to which groups outside the prosecutor's office cooperate in providing required information will partially determine prosecutorial policy. To understand why a pretrial screening program is operating in a way peculiar to itself, these influential sources must be considered since they too have discretionary powers that are as potent for the operation of pretrial screening as the powers available to the prosecutor. Police discretion, for example, can severely limit the capacity of the prosecutor to deal with certain types of crimes.[30] Lewis Katz underscores this point when he states: "Police decisions such as deployment of forces and responses to citizen calls will, in large part, set the tone for the selection of crimes to be prosecuted." [31] In addition, the decisionmaking capacity, the training, and the personal attitudes of an individual officer will affect the arresting and charging decisions made at the arrest stage.[32] The desire to see the suspect convicted will influence the policeman's decision to arrest, and the report which is sent to the prosecutor's office. For example,

> The officer may choose not to arrest because he knows the courts are clogged and is aware of how many times he will have to appear in court before a particular case is resolved. Although a decision to limit the case flow is not one for the beat officer but is more properly one for the police leadership, in conjunction with the prosecutor and the courts, the officer may nevertheless set himself up as the decisionmaker.[33]

Of equal, if not greater importance, is the role of the detective in the charging process. Once the policeman has filed his report, the detective in charge of the case "has almost total discretion as to whether to proceed * * *" [34] In theory, when the decision to proceed is made, all police involvement ends. Nonetheless, concern with the final outcome of the case will continue even though the ultimate decision to charge or not charge is the prerogative of the prosecutor.[35]

Judicial discretion in dealing with cases may limit the prosecutor's ability to gain his desired ends. The desire to see criminals prosecuted and convicted is assumed to take priority among prosecutors. However, the policy of the presiding judges may affect the prosecutor's ability to control the ultimate disposition of cases. A good example of this conflict can be seen when a judge accepts a plea to a reduced charge over the prosecutor's objection. Additionally, the policy of the probation officer affects the presentence investigation recommendations. Finally, the use of discretion by parole boards in determining whether or not to release a

[26] Miller, p. 19.
[27] Grosman, p. 25 and Miller, p. 17.
[28] Miller, p. 19.
[29] Ibid., p. 16.
[30] Katz, p. 93.
[31] Ibid., p. 93.
[32] Ibid., p. 95.
[33] Ibid., pp. 98–99.
[34] Katz, p. 103.
[35] See Ibid., American Bar Association Project on Standards for Criminal Justice, and Miller.

prisoner has been criticized as overly arbitrary, calling for guidelines to determine what aspects of the criminal's behavior should be judged in order to make a proper decision.[36] For example, the ability of a parole board to release those prisoners whom they believe to have exhibited behavior indicative of rehabilitation is absolute. Nonetheless, the prosecutor may find that the rate of recidivism is very high, conclude that incarceration is not working and seek alternative means such as diversion programs to help resolve this conflict.

Information types, time constraints, and the use of discretion outside the office of the prosecutor are external factors that affect the operation of pretrial screening programs. The adaptation of screening procedures to particular situations is based on not only the desires of the prosecutor, but his reaction to what is taking place in the rest of the criminal justice system. The extent to which review is possible, the type of review which is institutionalized, and the value of that review are, in part, a function of the external factors which affect decisionmaking.

c. *Prosecutorial control and response.* The internal factors operate in those areas over which the prosecutor has control and reflect a response to his environment. A primary factor lies in the prosecutor's own perception of his role and charging responsibility. The dominant perspective of the literature on prosecutorial behavior is an ethical orientation as to how the prosecutor should perceive his role.[37]

> The prosecutor ordinarily should prosecute if after full investigation he finds that a crime has been committed, he can identify the perpetrator, and he has evidence which will support a verdict of guilty.[38]
>
> In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved . . . the prosecutor should not be deterred from prosecution by the fact that his jurisdiction's juries have tended to acquit for a given type of crime. * * * The prosecutor should not bring or seek charges greater in number of degree than he can reasonably support. * * *[39]

An exception to the above position is made by George Fraser Cole.

> Only those cases in which there is a high probability of conviction will be brought into the courtroom. Prosecutors suggested that they had the administrative experience and expertise to make judgments concerning the disposition of cases. . . . They expressed the attitude that the rules of the system should give them freedom to make decisions for the good of the defendant as well as for society.[40]

The contrast in these views is important for the purposes of this review because we believe that it is not enough to know what the prosecutor should do; we wish to know what he wants to do and compare this to what he is doing. Though it may be the function of the prosecutor to bring those cases before the courts which are important, even if not convictable, the presence of an overworked and understaffed criminal justice system makes it apparent that ways must be found to make the system more effective. Pretrial screening is one of many ways because it gives the prosecutor the advantage of substantial review of cases prior to their being charged, and allows him the freedom to discard those cases which he believes do not serve societal interests.

The apparent conflict between the prescribed or ethical view of screening and the actual process is probably due more to the prosecutor's perception of his charging responsibility than to the existence of external factors.

An attempt to move pretrial screening from an ethical orientation to a practical operational focus can be found in *The Prosecutor's Screening Function.*[41] This work outlines certain guidelines on how information flows should operate, and the types of choices and controls which should be institutionalized in order to develop an effective screening program. Yet more important than its prescriptive function is its discussion of the varous areas which must be dealt with for pretrial screening to become operational. These areas of concern include:

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[36] Peter B. Hoffman and Don M. Gottfredson, *Parole Decision Making* ("Paroling Policy Guidelines: A Matter of Equity, Supplemental Report Nine," Davis, California: National Council on Crime and Delinquency Research Center, June, 1973.)

[37] American Bar Association Project on Standards for Criminal Justice and Miller.

[38] American Bar Association Project on Standards for Criminal Justice, p. 93.

[39] Ibid., p. 34.

[40] George Fraser Cole, *The Politics of Prosecution: The Decision To Charge* (Ann Arbor, Michigan: Xerox University Microfilms, 1968) p. 158.

[41] National Center for Prosecution Management, Joan E. Jacoby, Executive Director, *The Prosecutor's Screening Function: Case Evaluation and Control* (Chicago: National District Attorneys Association, 1973).

- physical layout of the screening office;
- allocation of the workload;
- control of inputs into the office;
- screening guidelines to insure the assistant's ability to make decisions in line with the prosecutor's policy;
- record keeping; and
- formal case evaluation techniques for screening.

In particular, those operational areas of special concern to pretrial screening are identified. The distribution of work through the office reflects the allocation or priorities to particular functions, thereby demonstrating the importance or lack thereof of intake and review. The formal case evaluation techniques employed indicate how well institutionalized a screening program is in an office. Finally, the control of input indicates the extent to which intake has been limited and review refined.

By examining the operations process, a topic area not discussed in other literature, we have expanded the possibility for an accurate evaluation of what takes place in a screening program. The importance of the operations process is that it permits us to determine why certain charging decisions are being made. We believe that it is not enough to know what decision is being made by the prosecutor when he charges an individual with commission of a crime. We must know why that decision is being made. By accounting for various elements beyond the prosecutor's control, as well as those variables under his control, such as workload allocation and case evaluation techniques, it is possible to understand better how certain decisions are reached.

4. *Management and administrative procedures.* Visits to numerous prosecutors' offices demonstrate that ideas of management appear foreign to some prosecutors. Explanations of this fact may vary, but certainly we may include such reasons as their training and lawyer-client relationships. Nonetheless, the institution of a formal structure to handle prosecutorial functions implies that responsibility for certain tasks must be delegated by the prosecutor, and accountability for these functions must be established within the office. For management purposes it is important that tasks be delineated so as to inform the employee of the extent and limits of his functions, and that accountability for the proper carrying out of the task lies with him. For control purposes the prosecutor must know how the system operates, how effective a program is, how effective an individual is, and what types of data are needed to explain or predict program and individual effectiveness.

In order to provide this information, certain management procedures must be established which permit developing effectiveness measures. For example, methods by which to monitor program and individual behavior are necessary. Yet our review of material on pretrial screening sheds little knowledge on measuring the effectiveness of operations. In Grosman [42] we find a very limited discussion of administration. He states:

> persons become objects and products which must be processed through the system. The prosecuting system acts as an effective machine for the production of convictions and the processing and disposition of convicted persons into institutions set up to deal with them. The chief aim of the system is to control the efficiency of the process and guarantee the continuance of the stream without inordinate delay and complication.[43]

Grosman's analysis of system effectiveness is correct and useful, but he has not provided any indication of the mechanisms or procedures that would be necessary to evaluate the system's effectiveness.

The failure of prosecutor's to institute, or even be concerned with management procedures is best explained by Cole:

> In seeking to understand some of the administrative problems of the prosecutor's office, it will be necessary to work outside of existing organizational theory. For this theory has not yet dealt with organizations possessing the major characteristics of the prosecutor's office: a collegial relationship among decisionmakers, ill-defined hierarchical relations with other agencies, and the influence of a professional body.[44]

Though Cole is wrong in stating that existing organizational theory does not deal with a collegial organization [45] he does state correctly that systems analysis has not been applied to the prosecutor's office. The literature on pretrial screening is devoid of attempts to view the prosecutor's office as a processing or decisionmaking system handling a flow of work.

The charging choices available to the prosecutor,

[42] Grosman, pp. 67–68.

[43] Ibid., p. 58.

[44] Cole, p. 90.

[45] See Max Weber, *The Theory of Social and Economic* Organization (New York: The Free Press of Glencoe, 1947), Arthur L. Stinchcombe, "Formal Organizations," in *Sociology: An Introduction,* Neil J. Smelser ed. (New York: John Wiley and Sons, Inc., 1967), Wolf V. Heydebrand, *Hospital Bureaucracy: A Comparative Study of Organizations* (New York: Dunellen Publishing Company, 1973), pp. 19–32, and Edward Gross, "Universities as Organizations: A Research Approach," *The American Sociological Review* 33: 518–44.

those used, and the resultant types of decisions made will reflect the policy of the office and the type of role the prosecutor will choose to adopt. For choices to be made correctly, or at least to fulfill the expectations of the prosecutor, strict rules must be established. The effectiveness of these rules in carrying out the prosecutor's policy can only be determined if some type of monitoring system exists. Despite Cole's assertion that traditional models of organization do not hold, an office of adequate size will have some type of hierarchical structure. That structure will define roles within the organization. In order to insure that individuals filling these roles make the correct choices it is necessary to institute policy and have feedback mechanisms which indicate what choices have been made. The results of those choices are demonstrated by the way a case is disposed of at some point after screening. The collegial nature of the prosecutor's office does not preclude the institution of a monitoring system. Trust in the ability of one's assistants to fulfill their roles and carry out the prosecutor's policy is important, but a prosecutor's policy is only as good as the manner in which it is put into action. To insure its proper application, an organization must be instituted and that organization must be monitored.

D. Summary

To examine pretrial screening as a process means to see it as a continuum functioning over a specific period of time, and impacting upon other prosecutorial functions and all other elements of the criminal justice system. The decision to charge and the management and operations processes function as a unit within the prosecutorial process. The literature, on the whole, has failed to see these processes working as a unit because the authors have failed to consider the various elements which constitute pretrial screening. Rather, the literature has viewed pretrial screening in terms of its final result: the decision to charge. The fundamental error implicit in this view is the autonomy of a decision. Decisions cannot be separated from the review procedure established, the information provided by law enforcement agencies, the charging policy, and the role the prosecutor may adopt. The importance of the interaction between the various elements which go into forming a pretrial screening program is underscored by one school of social theory [46] which has shown that the nature of prior choices enhances or precludes the opportunity to exercise subsequent options. An example of this in the criminal justice field might be the decision by the prosecutor not to prosecute or divert suspects in victimless crimes. The impact of this decision would be felt at all levels of the criminal justice system, from the police to the courts. Cole, for example, calls this interaction "exchange." In addition there will be an impact upon the office of the prosecutor. The decision to make certain choices, as the diversion of those suspected of victimless crimes, will necessitate that certain programs be instituted in the prosecutor's office or in the community. The presence of diversion programs will expand the quantity of choices available to the prosecutor; the presence of differing charging choices among prosecutors will reflect differences in policy.

The lack of discussion about the operations process has resulted in a lack of ready criteria for the assessment of intake and review. Those who have studied the pretrial screening process have failed to see it as part of either the prosecutorial system or the criminal justice system. The result is, in part, a failure to see pretrial screening as part of a continuum rather than as an isolated act and as a means to an end, the disposition of a case, rather than as a goal in itself. Screening cannot be separated from the larger system of which it is part if it is to be evaluated. It is an implicit part of that system, and must be treated as such. Finally, the lack of discussion of management procedures indicates that little consideration has been given to the crucial question of how to insure that the prosecutor's policy is being carried out.

Further evaluation of pretrial screening must be carried out with regard to these issues. Chapter II elaborates on these issues by examining the three major factors of perception, policy and choice that affect and characterize pretrial screening programs.

[46] The phenomenologists as represented by Jean Paul Sartre and Peter Berger.

CHAPTER II. FACTORS IN PRETRIAL SCREENING: PERCEPTION, POLICY AND CHOICE

A. Introduction

There are still many prosecutors in the United States today who either are not provided with an opportunity for reviewing cases before they are filed with the court, or who do not perceive the necessity for doing so. There are many others who view pretrial screening as one of the most valuable inventions of the twentieth century because it eliminates cases not worthy of prosecution, thereby reducing the workload (and costs) of the prosecutor's office as well as the court. The fact that pretrial screening programs have gained such popularity certainly is due to a recognition of these very real benefits and economies. Why then, if pretrial screening offers such potential value to a prosecutor is it not used by all prosecutors? And even where it is used, why are there such variations that standards and guidelines for establishing and monitoring such programs are not available? The answer to these two important questions lies in understanding what factors support the existence of pretrial screening and how the prosecutor's policy creates different types of screening programs that, on the surface, appear to defy classification. With this understanding, a prosecutor can better evaluate his circumstances and choose that type of pretrial screening program most suited to his needs.

B. Factors Affecting the Existence and Character of Pretrial Screening

There are three major factors that affect the existence and determine the character of pretrial screening programs. They are, in ascending order of importance:

- the degree to which the state constitution, legislation, and the local criminal justice system provide an opportunity for the prosecutor's review of the case;
- the prosecutor's perception of his responsibility in charging;
- the prosecutor's policy with regard to prosecution and the disposition of cases.

1. *Opportunity for case review.* The authority of the local prosecutor is derived from the state constitution, prescribed primarily by statute and implemented within a local criminal justice system. As these conditions vary, so do they cause variation in providing an opportunity for the prosecutor to review the facts of a case before it is filed in the court. While an energetic prosecutor can adapt or adjust to a nonsupportive environment, it is better by far that the environment be supportive initially. Some state legislatures have recognized this need and have passed enabling legislation to support the pretrial screening authority of the prosecutor. The state of Michigan is an example of this type of environment. Here by statute, (MICH. STAT. ANN. #28, 860, 1967) the approval of the prosecutor is required before an arrest warrant may be issued. In contrast, where such legislation does not exist, or is not implemented, the prevalent practice is the filing of cases by the law enforcement agencies directly with the judiciary, usually a magistrate or justice of the peace. When cases are processed under these conditions, little opportunity for prosecutorial review exists until the preliminary hearing or preliminary examination. This is not to say that the benefits provided by such a supportive environment will be sufficient to conduct proper pretrial screening. On the contrary, the quality of the review and screening activity is highly dependent upon the quality of the police reporting. Thus while the opportunity for screening and case review can be provided by a supportive state constitutional and legislative environment, the quality of the review is dependent on other factors more local in character.

The local criminal justice system, especially the law enforcement agencies and the courts, also affects the degree to which the prosecutor has an opportunity to review a case before it is filed. Law enforcement practices may differ among the agencies operating within a prosecutor's jurisdiction thereby hindering the establishment of a standard case review procedure. In some jurisdictions the enforcement agencies may file directly with the magistrate who, in turn, informs the prosecutor of the existence of the filing. In other jurisdictions, prosecutorial approval may be requested on an informal or occasional basis when the police officer has

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doubts about the charge or the evidentiary strength of the case. Even if standard review procedures could be developed, primary consideration has to be given to the timing of the police reports, their accuracy and adequacy for review and decisionmaking. To the extent that the information is deficient in these areas, the quality of pretrial screening is degraded.

The structure of the court system also has a significant impact on the prosecutor's opportunity to screen and review cases. The least favorable condition for screening exists when there are two court systems operating within a single, felony judicial jurisdiction. In this framework, not only is the opportunity for review of felony cases delayed, but the system of justice is so fragmented that control points and procedures are almost impossible to establish. One example of this condition can be found in the state of Connecticut. The Chief Prosecutor in a Connecticut jurisdiction processes misdemeanors, handles probable cause hearings for all felonies, may complete prosecution on a certain type of felony (Class D) and binds over the remaining felonies to the States Attorney for prosecution. From the States Attorney's perspective little opportunity for review exists until the case has been bound over. The quality of the review performed by the Chief Prosecutor's office and the judgments of the lower court directly impact on the workload of the States Attorney's office, yet present little opportunity for control of this decisionmaking process. This is an extreme example of the effect that separate processing systems (be they prosecutive or judicial) have on the pretrial screening function.

In reality a more common situation exists when a single prosecutive system functions between two court systems. This occurs generally when a lower (misdemeanor) court exists with the authority to conduct probable cause hearings for bindover to the higher (felony) court. Although potentially, cases can be reviewed at intake in the lower court, this occurs infrequently. Since the resources of the prosecutor are most often limited, the lower court has younger, less experienced assistants to handle the misdemeanor cases and the probable cause hearings. The screening and review function is reserved for those fewer cases which survive the bindover proceeding. Probably the best opportunity for screening and reviewing cases exists when one prosecutive system operates with one court system as in New Orleans or Baton Rouge. Where this occurs, little distinction is made between felonies and misdemeanors with regard to case review. All are examined; the first decision made is the charging level (felony or misdemeanor) and the second is in terms of case assignment. Under this type of system, the maximum opportunity for case review exists and the decisions can be controlled and monitored.

When a bindover is made to a grand jury, under some circumstances another opportunity for review is created; under others, another processing step is added to delay the system. While most jurisdictions have a grand jury, the extent of its use varies. In most of the Eastern states, the common practice is to process all felonies and even some indictable misdemeanors through a grand jury. Since the use of grand juries is derived from the English system of justice, this practice is most prevalent in those states which formed the original 13 colonies. Rhode Island, for example, until 1975 processed all felony cases through the grand jury. In fact their first examination by the Assistant Attorneys General was at this processing stage. In 1975, Rhode Island made a major change in its felony processing, substituting the use of grand jury to obtain indictments with filing by information based on probable cause. As one moves westward, the use of grand jury indictments to begin felony prosecutions diminishes while the practice of filing by information increases. For example, only capital crimes (murder, kidnapping, rape) need processing by a grand jury in Louisiana. In Des Moines, Iowa, the use of the grand jury in 1973 was limited to crimes against persons, crimes against property being filed by information. In the far West, the use of the grand jury is reserved almost solely for investigations of corruption of public officials. Thus, whether a grand jury exists and the extent to which it is used to provide an opportunity for felony case review has to be taken into consideration in the establishment of a pretrial screening program.

While the state constitutional and legislative environment may support pretrial screening activity in a local prosecutor's office, it is not a primary determinant as to whether such activity is performed or even how it is performed. This conclusion is most easily verified by a simple observation of the variety of pretrial screening programs operating in local prosecutors' offices throughout the same state. Of more importance in terms of external factors affecting the opportunity for case review are the characteristics of the local criminal justice system, particularly the practices of the law enforcement agencies and the structure of the courts. The external environment presents, in one form or another, an opportunity for case review. Whether this opportunity is seized by the local prosecutor is highly dependent upon his perception of his responsibility in this area.

2. *Perception of charging responsibility.* The most important determinant in the establishment of a pretrial screening program is the prosecutor's own perception of his charging responsibility. If a prosecutor does not perceive that it is his responsibility to reach a charging decision, then any discussion of pretrial screening is moot. This is not a *reductio ad absurdum* statement. Indeed, there are prosecutors today in the United States who, on the one hand, do not realize that they have the discretionary power to refuse to charge a case or change the level of the police arrest charge, or on the other hand, do not perceive the necessity for exercising this discretionary power.

The former condition, not recognizing that they have discretionary power, is most simply corrected by training and education. The latter condition requires some explanation because it directly affects the extent and types of pretrial screening which exist in great variety today. The wide differences in prosecutorial perception of charging responsibility can be most readily understood if one thinks of the range of possibilities in terms of a continuum. At one end is the prosecutor who abdicates the screening responsibility, somewhere in the middle is the prosecutor who views his responsibility as that of interpreting the law, and at the other extreme, is the prosecutor who through his charging policy, becomes a policymaker for his community.

The prosecutors who abdicate their responsibility usually do so because of a combination of reasons. In one case, the prosecutor views himself as an extension of the law enforcement activity, thereby relying upon police work and accepting police charges. Sometimes this practice exists because of tradition; sometimes it reflects the influence of the police. An example of the latter could be found in the recent past in Chicago (Cook County), Illinois where the police were making arrests and presenting the case to the magistrate. The prosecutor was permitted to change the charge only with police approval. Remnants of a similar police oriented system still exist in some areas of Massachusetts where in the lower, misdemeanor courts, police actually prosecute cases and are called police-prosecutors. Usually, *however, prosecutors who view themselves as extensions of the law enforcement process do so not because of police influence but because they tend to confuse the distinction between a law enforcement officer's decision to arrest based on probable cause and the prosecutor's decision to charge based on the sufficiency of the evidence.*[1]

[1] Brian A. Brosman, *The Prosecutor: An Inquiry into the Exercise of Discretion,* (Toronto: University of Toronto Press, 1969) pp. 20-23.

A prosecutor can also minimize his charging responsibility if he views himself as an arm of the court. Although he is generally a member of the executive branch of government,[2] the prosecutor can often lose his separate identity in his daily workings with the judiciary. With a judicial perspective, the prosecutor tends to rely on court hearings to make such decisions as setting the charge or rejecting the case. The most prevalent method is to use the probable cause hearing to determine evidentiary sufficiency rather than probable cause. Another form of dissociation from assuming a responsibility for charging occurs in the prosecutor's use of the grand jury. Here, the prosecutor may use the grand jury to reject cases which need to be dismissed but have such community sentiment or media attention that he is unwilling to accept personal responsibility or the political consequences of such an act.

As the prosecutor recognizes and accepts his responsibility for charging, he moves from the abdication end of the continuum through various levels of exercising this responsibility. The first step in the assumption of responsibility usually occurs when a prosecutor allows the charging decision to vary with the circumstances of the case. For example, the little old lady caught shoplifting $5.00 worth of food may not be charged; the youngster picked up joy-riding in a stolen car may be released with a warning. On the other hand, the drug pusher with a record of assaults and robberies would be charged at the highest sustainable level.

When the prosecutor views his charging responsibility as that of interpreting the law, he tends to establish standards and rules for charging. These are usually exceptional in nature and are expressed as negatives. For example, he will *not* prosecute bad checks if under a certain amount; shoplifting if the merchandise is less than a specified value; marijuana if under a specified quantity. Since the charging decisions are based on interpretations of the law and can be expressed as standards or rules, they require the examination of all cases to see if they meet the conditions. This creates the first requirement for establishing a screening unit. Because charging decisions are based on a set of rules and stated exceptions, the need for monitoring the uniform application of these rules to the charging decision is established. Finally, since the rules are explicit, an evaluation of the impact of these decisions is easily made.

[2] Exceptions are prosecutors in the states of Louisiana and Connecticut who are part of the judicial branch.

At the other end of the continuum, the prosecutor views his charging responsibility as a tool for making policy in a community. He moves away from the mere interpretation of the law into the role of policymaker. This is possible, because in most jurisdictions the prosecutor is a locally elected official with an independent power base, his constituency. Because of this status, he can gather together the resources of the community to change or establish community policy and programs. Whether his decisions concern prosecuting pornography sales, enforcing Sunday blue laws, establishing pretrial diversion programs, consumer fraud units or environmental protection programs, his role as policymaker is evident. A practical result of this policymaking role is a screening program that supports and reflects his policies and goals. The institution of pretrial screening in this type of prosecutor's office is ideologically most complex. Since the decisions made here reflect an expansion of the prosecutor's discretionary power into all areas affected by his policy, the need to develop screening programs that ensure uniform and consistent charging decisions is imperative. The techniques to ensure uniformity and consistency cannot always be expressed as simple rules. *Where decisions have to be made in light of policy, the primary purpose of the screening program is to ensure that the prosecutor's policy is transmitted to those assistants making the decisions and that the assistants apply the policy uniformly in all cases.*

3. *Prosecution policy. No matter how the prosecutor views his charging responsibility or uses his discretionary power, he operates with a policy, even if implicit. If it is not the one he inherited when he took office, it is likely to be the one for which he was elected. Prosecutorial policy is the primary factor in establishing the existence and character of pretrial screening programs.* To examine the impact of policy, we must identify what the prosecutor hopes to do because then its effect can be evaluated in terms of what actually happens.

The first step taken in implementing policy is making the charging decision. The charging decision must be consistent with the prosecutor's policy if the implementation is to have meaning. For example, there is little sense in an assistant charging a defendant with possession of less than an ounce of marijuana if the prosecutor believes that the majority of first offender cases, and cases involving minor crimes do not benefit from prosecution and the effects of criminal justice processing. Similarly, if the office policy is to go forward only on strong cases and to minimize plea bargaining, an assistant who charges a relatively weak case in an attempt to strike a bargain later is placing his actions in direct opposition to the prosecutor's policy. *Policy's most critical moment occurs at its translation into a charging decision.* Once this decision is made, the options for handling the case tend to narrow and case processing procedures become more predictable as the preparation and trial stages are approached. Since policy has emerged as the primary and critical factor in the operation of pretrial screening programs, an examination needs to be made of the various types of policies and how they affect the processing of cases in a prosecutor's office.

C. Four Policy Types

As a result of the recent research in this area,[3] four identifiable policy types have been isolated and their impact on prosecutorial decisionmaking and case dispositions examined. The purpose of presenting these four policy types in detail now is to show the prosecutor the importance of his charging policy as it operates in a pretrial screening program and the effect that this policy has on the ultimate disposition of cases. Additionally, it is hoped that this presentation will demonstrate that policy choices are available to meet specific preferences of the prosecutor.

Prosecutorial policy can be defined as a course of action adopted by a prosecutor to perform his function. We have seen that there is wide variation in the prosecutor's perception of his job. Thus it is to be expected that there would be a number of policies pursued by prosecutors that are derived from these differing perceptions.

Undoubtedly, many other policy types exist in addition to the four discussed here. There is no claim made here for exhaustiveness. Nor is the claim made that these policies exist in pure form in all prosecutors' offices. On the contrary, offices have been observed in which one policy is applied at the misdemeanor level and quite a different one operates at the felony level. The policies are presented here as though they exist in a pure form. This is done so they can be examined more easily, their effect projected without offsetting conditions and the range of choices available to the prosecutor more clearly described. For convenience, the policies have been given the shorthand titles of Legal Sufficiency, System Efficiency, Defendant Rehabilitation and Trial Sufficiency. The reader should feel free

[3] See the publications emanating from the Phase I Evaluation of Pretrial Screening Programs conducted by BSSR for LEAA's National Evaluation Program Grant Number 75NI-99-0079.

to use whatever terminology he thinks is more appropriate if these name tags become confusing.

Two significant points regarding prosecutorial policy should be borne in mind while reading this section:

- *The policy of the prosecutor can produce different patterns of case disposition.*
- *A prosecutor's performance cannot be judged unless one knows what his policy is, and what he hopes to achieve.*

1. *Legal Sufficiency policy. Some prosecutors believe that if a case is legally sufficient (namely the elements of the case are present), then it is their responsibility to charge and prosecute.* For example, in a breaking and entering case, if there was evidence of forcible entry, that is, entry was made without the permission of the owner, and the person arrested was found to have in his possession items belonging to the victim, the case would be accepted for prosecution because it was legally sufficient. The elements of the case are present. However, what may on the surface seem to be a prosecutable crime, may indeed be lost because of constitutional questions, for example, an illegal search and seizure by the police officer in the course of making the arrest. Implementing this policy at the charging level requires only an examination of each case for legal defects. If the basis for a charge is not legally sufficient, either additional investigation could be ordered or the case would be rejected.

The legal sufficiency policy is most prevalent in the lower, misdemeanor courts. It functions well in an assembly-line environment where cases are routinely and quickly examined for obvious defects prior to court appearance. This is usually the extent of screening that a case receives. As a result, the caseload tends to increase since rejection rates are low. To counteract this increase, the prosecutor relies on the courts to dismiss those cases which are weak, while he conducts extensive plea negotiations in order to minimize the number of cases that either are bound over or might be scheduled for trial. Since this policy operates in congested courts, all the problems attendant to case preparation, victim and witness notifications and scheduling exists. Under these conditions one does not expect a good trial record. While this policy is almost routinely applied to cases being processed in lower, misdemeanor courts, it is not apt to be used in felony prosecutions. Thus, two or more policies may co-exist in a single prosecutor's office, one for felonies, and the other for misdemeanors. Figure 1 illustrates the disposition patterns which may be expected to occur when the legal sufficiency policy is operating. A more detailed examination of this figure and the subsequent ones will be undertaken in the next chapter.

FIGURE 1.—*Legal sufficiency policy,—expected frequency of dispositions* [1]

Disposition universe (Numeric base for rates)	Disposition	Frequency
Cases presented...	Reject for prosecution....	Low
	Accept for prosecution....	High
	Divert—non-CJS.....	Not predictable
	Refer—other CJS.....	High
Cases accepted...	Dismiss at preliminary hearing.	High
	Bound over.....	Minimize
	Plea to reduced charge...	Maximize
	Plea as charged.....	Low
Cases bound over.	No true bill (grand jury only).	High
Trials.....	Guilty—trial.....	Low
	Acquittal—trial.....	Low
	Dismissed—trial (insufficient evidence).	High

[1] Policy: If the elements of the case are present, accept for prosecution.

2. *System efficiency policy.* One of the most familiar policies to be found today in large offices can be called "system efficiency." *This policy aims at the speedy and early disposition of cases by any means possible.* Time to disposition and the place in the court process where disposition occurs are measures of success in addition to favorable dispositions. Under this policy, the breaking and entering case cited in the preceding policy would be rejected because emphasis is placed on screening as a way of minimizing workload and the search and seizure problem would have been spotted. If there were no search and seizure issue, the case would have been accepted, charged as a felony, and in all likelihood, the defendant would have plead guilty at the committing magistrate hearing to a reduced charge of unlawful trespassing or larceny (both misdemeanors). This policy usually emerges when the court is overloaded, heavily backlogged and the resources of the prosecutor extremely limited.

Under these conditions, emphasis is placed on excellence in the pretrial screening program and resourcefulness in the use of a variety of methods for early case disposal. Cases will be examined for their ability to be plea bargained (hence overcharging may occur). Extensive use will be made of community resources, other agency resources and diversion programs

so that cases are kept out of the criminal justice system. The prosecutor himself may be an active searcher for additional avenues of case disposition. Charges will be broken down for handling in the lower courts, if possible, or modified and referred to another court with a different jurisdiction (e.g., a county court case referred to municipal court). The fullest utilization of the court's resources and the prosecutor's charging authority will be made to dispose of cases as soon as possible. Particular emphasis will be placed on the disposal of the case prior to a bindover to the higher court or grand jury. If the bindover occurs, emphasis will still be placed on plea negotiation. If not possible, a good trial record should ensue because of the experience of the assistants and the amount of review already given to the case. (See Figure 2.)

FIGURE 2.—*System efficiency policy—expected frequency of dispositions* [1]

Disposition universe (Numeric base for rates)	Disposition	Frequency
Cases presented...	Reject for prosecution....	Not predictable
	Accept for prosecution....	Not predictable
	Divert—non-CJS.....	Minimize
	Refer—other CJS.....	Maximize
Cases accepted...	Dismiss at preliminary hearing.	Low
	Bound over.....	Minimize
	Plea to reduced charge...	Maximize
	Plea as charged.....	Low
Cases bound over.	No true bill (grand jury only).	Not predictable
Trials.....	Guilty—trial.....	High
	Acquittal—trial.....	Low
	Dismissed—trial (insufficient evidence).	Low

[1] Policy: Dispose of cases as quickly as possible, by any means possible.

3. *Defendant rehabilitation policy.* A third policy, that of rehabilitating the defendant, utilizes some of the elements of the early and speedy disposition policy but should not be confused with it. In this situation, *the prosecutor believes that the most effective treatment for the majority of defendants who pass through his office is not to process them through the criminal justice system and more particularly, through the correctional system. He believes that any treatment other than this is better for the vast majority of defendants.* To cite our breaking and entering case again, if the defendant were a first offender or had a drug problem and restitution was made to the victim he might very well be placed in a pretrial diversion program. If none were available, and with the court's concurrence, he could receive a sentence of probation without conviction. The charging and prosecution decision depends primarily on the circumstances of the defendant and secondarily on the offense which he was alleged to have committed. Thus the goal is the early diversion of many defendants from the criminal justice system coupled with serious prosecution of cases allowed into the system. It is logical to expect vigorous prosecution if the defendant's history includes prior convictions with no evidence of rehabilitation. Offices using this policy tend to rely heavily upon the resources in the community as well as in the criminal justice system to move eligible defendants out of the judicial and correctional systems. Close cooperation with the court often ensues particularly in using the sentence recommendation power of the prosecutor to ensure consistency in the recommended treatment plan for the defendant. (See Figure 3.)

FIGURE 3.—*Defendant rehabilitation policy—expected frequency of dispositions* [1]

Disposition universe (Numeric base for rates)	Disposition	Frequency
Cases presented...	Reject for prosecution....	Not predictable
	Accept for prosecution....	Minimize
	Divert—non-CJS.....	Maximize
	Refer—other CJS.....	High
Cases accepted...	Dismiss at preliminary hearing.	Low
	Bound over.....	High
	Plea to reduced charge...	Not predictable
	Plea as charged.....	Not predictable
Cases bound over.	No true bill (grand jury only).	Low.
Trials.....	Guilty—Trial.....	High.
	Acquittal—trial.....	Low
	Dismissed—trial (insufficient evidence).	Low

[1] Policy: Divert, since the vast majority of defendants cannot benefit from criminal justice processing.

4. *Trial sufficiency policy.* The fourth policy in common use is that of trial sufficiency. *This policy states that a case will be accepted only if the prosecutor is willing to have it adjudicated because it is strong*

enough to sustain a conviction. Under these circumstances, the prosecutor interprets his responsibility very stringently but without leniency. If a decision were made to charge the defendant in our hypothetical breaking and entering case, and again, if the constitutional question of the search and seizure were overcome, the defendant would be charged with a felony and a conviction expected at this level. Under this policy, good police reporting is required since the initial charging stage closes out most options. It also requires alternatives to prosecution since not all cases will be prosecuted. Most importantly, it requires court capacity since each case accepted is expected to go to trial. Finally, this policy, as compared to the others, mandates the tightest management control in the office to ensure that the initial charge is both proper and, once made, not modified or changed without approval. (See Figure 4.)

FIGURE 4.—*Trial sufficiency policy—expected frequency of dispositions* [1]

Disposition universe (Numeric base for rates)	Disposition	Frequency
Cases presented...	Reject for prosecution....	High
	Accept for prosecution....	Low
	Divert—non-CJS.....	Not predictable.
	Refer—other CJS.....	Not predictable
Cases accepted...	Dismiss at preliminary hearing.	Minimize
	Bound over.....	High
	Plea to reduced charge...	Minimize
	Plea as charged.....	High
Cases bound over.	No true bill (grand jury only).	Low
Trials.....	Guilty—trial.....	Maximize
	Acquittal—trial.....	Low
	Dismissed—trial (insufficient evidence).	Minimize

[1] Policy: If a case is accepted for prosecution, it will be charged at a level capable of sustaining a conviction, or a plea to charge.

D. Summary

This chapter has presented an examination of the factors that affect the establishment and operation of a pretrial screening program. Under ideal circumstances, the state constitutional and legislative environment and case law provide the prosecutor with an opportunity to review cases prior to charging, and the local criminal justice system is structured and operated in a manner that satisfies his priorities. In less than ideal circumstances, where the court system is fragmented, police reports are not timely, accurate or complete, where charging decisions cannot be controlled, the prosecutor has to adapt and modify his operations so that at least his priority requirements are handled.

Despite the external environment, the major forces that shape the existence and character of pretrial screening are directly attributable to the prosecutor himself. How he views his charging responsibility determines whether he, first, needs a screening program and, if so, how complex it must be. Once he assumes the responsibility for charging, the decisions made reflect an anticipated disposition consistent with the prosecutor's policy. The direct relationship between the charging decisions and the expected outcomes has two results:

- The policy of the prosecutor can produce different patterns of case dispositions directly affecting the courts, corrections and the community.
- Since case disposition patterns vary according to policy, a prosecutor's performance cannot be judged unless one knows his policy and what he hopes to achieve.

The four prosecutorial policies examined here point up the fact that policy choices are available to a prosecutor. Since different policies affect outcomes at various stages in the process differently, they can be tested both logically and empirically. Before a prosecutor makes a choice, however, it is necessary to examine the consequences and impact of a choice and know what has to be considered in implementing a particular policy.

CHAPTER III. THE CONSEQUENCES OF POLICY CHOICE

In the preceding chapter little attention was given to providing a detailed discussion of the impact of the charging policy on dispositions. This is partly because the purpose there was to identify and discuss the different types of prosecutorial policies as observed in various offices, and partly because the full impact of such different types is brought most sharply into focus when the policies are compared with one another. In this chapter we will discuss not only the differences among the policies but we will also show how prosecutors using different strategies and different categories of personnel can ensure the effectiveness of their policy. The principles guiding resource allocation and the use of various implementing strategies should be applicable to other policies operating in the real world even though they are not discussed here.

A. Description of the Charging Policy Typology

Figure 5 presents case disposition patterns which logically would be expected to occur if the prosecutor's policy is operating in its ideal form.[1] For this comparison the goals and aims of each policy have been translated into outcomes that should be maximized in terms of their particular policy. A glance at the figure shows that as the policy changes, so do the maximized or minimized dispositions. For example, the legal sufficiency policy, which tends to prosecute cases if the elements are present, results in minimizing the number of cases bound over for trial and in maximizing the use of plea bargaining as a practical way of disposing of the majority of the cases accepted. These goals differ significantly from those of the defendant rehabilitation policy where the aim is to divert as many defendants as possible into treatment programs, accepting only serious cases for prosecution. Here the goal is to minimize the number of defendants accepted for prosecution and to maximize the treatment options for defendants. Clearly, as the policies differ, the dispositions which are to be maximized or minimized to meet the goals will also differ.

Once a prosecutor has chosen a course of policy action, thereby maximizing or minimizing certain dispositions, the frequency of occurrence of other disposition types follows logically. For example, if the overall policy is to speed up the system by reaching dispositions early in the process (system efficiency), one kind of disposition which tends to be maximized is "plea to a reduced charge." This type of maximization makes a high rate of guilty pleas to the original charge very unlikely. Where plea bargaining is withheld or minimized (trial sufficiency), on the other hand, pleas to the original charge become a practical alternative to standing trial and tend to occur in a large proportion of cases. Figure 5 shows the patterns of these logical extensions. Where they can be predicted, the frequency of occurrence is shown as either high or low.[2]

In each of the four policy types, there are some dispositional outcomes whose frequency cannot be predicted. Furthermore, dispositions, predictable under one kind of policy may very well not be predictable under another kind. The reasons for this are essentially two:

- obtaining a particular disposition type is not essential to the goals of a given program;
- the disposition depends on circumstances beyond the prosecutor's control.

As an example of the first condition; the number of cases disposed of by pleas (either reduced or reverted to the original charge) cannot be predicted for the defendant rehabilitation policy. Since the aim of this policy is to divert cases from the criminal justice sys-

[1] These patterns have been logically deduced and should be subjected to testing and verification. Also of interest, through subsequent testing, will be the degree or extent to which policies can operate in an ideal form in a prosecutor's office.

[2] No attempt has been made at this point to quantify "high" and "low". The state of the art is such that no one even knows whether this is possible. With such variation among offices, it would be exceedingly difficult to produce numerical standards or baselines that would be applicable to all. Thus, for the present, each prosecutor will have to collect his own disposition information, in his own office, and make his own determination whether the dispositions are occurring according *to what he thinks* is either high or low relative to the appropriate base.

FIGURE 5.—*Expected frequency of selected dispositions as a function of policy*

Disposition universe (numeric base for rates)	Dispositions	Policies			
		Legal sufficiency	System efficiency	Defendant rehabilitation	Trial sufficiency
Cases presented	1. Reject for prosecution	L	N	N	H
	2. Accept for prosecution	H	N	Mn	L
	3. Divert—non-CJS	N	Mx	Mx	N
	4. Refer—other CJS	H	Mx	H	N
Cases accepted	5. Dismiss at preliminary hearing	H	L	L	Mn
	6. Bound over	Mn	Mn	H	H
	7. Plea to reduced charge	Mx	Mx	N	Mn
	8. Plea as charged	L	L	N	H
Cases bound over	9. No true bill (GJ only)	H	N	L	L
Trials	10. Guilty—trial	L	H	H	Mx
	11. Acquittal—trial	L	L	L	L
	12. Dismissed—trial (insufficient evidence).	H	L	L	Mn

Key
Goals:
Mx—Maximize this disposition.
Mn—Minimize this disposition.

Expected outcomes:
H—High frequency.
L—Low frequency.
N—Not predictable.

tem, whether the prosecutor plea bargains with the remaining cases is irrelevant to the diversion goal and accordingly more a matter of his own preference.

In some instances, external factors have a bearing on dispositional outcomes. For example, the office operating with a goal of speed and efficiency will use pretrial screening extensively as a way of ensuring that only "worthy" cases are accepted and charged in terms of a desired disposition. The emphasis on well-planned screening means that the rejection rate cannot be predicted since it will tend to depend more on the quality of the work of the police agencies than on the policy of the prosecutor. High rejection rates might reflect poor police reporting practices; low rejections rates, good practices. Until these circumstances are known, no prediction of rejection rates can be made. In contrast, since only a cursory examination for the presence of the elements is required for the legal sufficiency policy, the rejection rate for this policy can be predicted as low.

The fact that the rates of some dispositional outcomes are not predictable according to this model because they depend on factors other than policy, does not necessarily mean that they operate randomly. Once the pattern within an individual office has been identified, the prosecutor should expect these disposition rates to be as consistent as the ones that are policy-related.

Finally, before we offer a detailed discussion of the consequences flowing from choosing a particular policy, the use of the adjectives "high" and "low" to describe a disposition rate must be put in perspective. One cannot simply state that a certain disposition is high or low. It must be high or low in relation to something. The best comparisons are obtained when the dispositions are measured as a percent of all dispositions that can occur in a particular phase of the prosecutorial process. These phases have been broadly grouped into the following:

Intake: All cases presented or brought into the office.

Processing: All the cases that have been accepted for processing.

Bindover: A special subclassification of processing referring to the results of grand jury actions if a grand jury is used, or a transfer of a case from a lower to higher court following a probable cause hearing.

Trials: All cases that actually reach a trial stage, or a final preparation for trials.

Dispositions can occur in any of these phases. *From a policy perspective, it is just as important to know* where *in the process a disposition has occurred as it is to know* what *the disposition is.* A plea of guilty accepted at a preliminary hearing has an entirely different meaning to a prosecutor pursuing a course of swift dispositions than a plea offered on the day of trial. A dismissal because of insufficient evidence is far more acceptable if it occurs at a probable cause hearing than if it occurs at a pretrial hearing or in the course of a trial. In other words, the policies under consideration here must be evaluated not only in terms of types and rates of dispositional outcomes, but also in terms of where they occur relative to time and processing phase. An example of this is illustrated in Figure 5 where dismissals are shown to occur at more than one process point.

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Once the timing of a disposition has been established, the outcome must be measured relative to all cases being processed in that *phase*. In this way, the disposition can be judged in relation to all possible dispositions that could have occurred. The simplest illustration of this type of measurement is the rejection rate. The true meaning of this rate is obtained when viewed as part of the universe of *all* cases brought to the prosecutor's office. Of all the cases presented, how many were accepted? How many were referred to another court or jurisdiction? How many are diverted to treatment programs. Finally, how many were rejected? Only by comparing the decisions made in relation to all available choices at a particular step in the process can one begin to understand what is happening in an office. Figure 5 illustrates this principle by relating selected dispositions to their respective universes. The dispositions selected for use here are not exhaustive. Rather, they have been chosen because they appear to be the most sensitive indicators of the impact of a prosecutor's policy event though further refinement is clearly indicated.

B. Consequences of Policy Choice

1. *Disposition patterns and policy.* It is now time to examine, in detail, the consequences of following one policy or program as compared to another. With Figure 5 as our guide, examining any disposition row shows that the expected outcomes may change drastically according to the policy chosen and may be explained in terms of the policy's impact on the prosecution system. For example, the number of cases dismissed at a preliminary hearing or a probable cause hearing is expected to be high under the legal sufficiency policy because prior to this stage, cases receive only a cursory review for obvious defects. As a result, other more serious defects or problems may not be noticed until this later point in the processing is reached.[3] On the other hand, the expected low dismissal rates for a system efficiency or a defendant rehabilitation policy is based on the assumption that relatively few weak cases will slip through the extensive screening procedures used by prosecutors to implement these policies. Under a trial sufficiency policy, a dismissal at preliminary hearing would be considered disastrous since accepted cases are expected to survive and be disposed of by plea or conviction.

Dismissals at the trial stage (although fewer in number than those occurring prior to an actual trial) should follow essentially the same pattern. Given the environment surrounding prosecution under the legal sufficiency policy (assembly-line processing of large volumes), it is to be expected that some of the weaker cases will slip through the entire process or a breakdown in communications will result in a high loss rate. This is likely to occur less frequently under other conditions. The system efficiency model will have disposed of most cases through plea negotiation, those that do reach the trial stage in all likelihood are considered "unbargainable" and are carefully prepared. Similarly, careful preparation of the remaining cases in the defendant rehabilitation system should be in order since these remaining defendants are considered sufficiently deviant to warrant prosecution. With a smaller caseload and a policy of vigorous prosecution of the recidivist, the cases should be solid and the dismissals relatively rare.[4]

Not all dismissals are adverse measures of prosecutorial performance. Dismissals of other pending cases against a defendant may be made after a conviction has been obtained in one case, or as a condition of plea negotiation. In other instances, the case may be dismissed because of circumstances beyond the prosecutor's control. For example, the arresting officer failed to show, the defendant was transferred to a medical or health treatment facility, or the complaining witness changed his mind and decided not to press charges. The dismissals used to evaluate the performance of the prosecutor should be confined to those which reflect an insufficient case or lack of adequate preparation, rather than dismissals beyond his control. *Despite the variations in causes for dismissals, a purified dismissal rate (that is, one which attributes responsibility to the proper participant in the system) is probably the most sensitive of all disposition types in evaluating prosecutor performance and the most accurate for a prosecutor in measuring the effect of the charging policy.*

As a final illustration of the changing disposition patterns caused by different charging policies, let us examine the expected frequency of cases bound over. Bindovers occur when the prosecutor has shown that there was probable cause to believe that the defendant committed the crime and generally refer to the action of binding the defendant over for indictment by grand

[3] An alternative argument is that this occurs often not as a result of conscious policy choice but because the prosecutor believes it is the court's task to determine legal sufficiency.

[4] A special explanation should be made regarding dismissals. In some jurisdictions, a *nolle prosequi* may be used in lieu of or in conjunction with dismissals. The distinction is noted but for the purposes of this discussion, we are grouping both dispositions into the term "dismissal."

jury or arraignment on information if the grand jury is not used. It usually refers to felony or felony-level offenses and hence the more serious cases. Minimizing the number of bindovers under a legal sufficiency policy is almost a necessity. The office can little afford the additional workload this action places on the staff or the time required to develop and prepare the case. The system efficiency model also aims to reduce the number of cases bound over but less for workload reasons than for time considerations. If the system is to be speeded up, the fewer the processing steps involved and the earlier in the system the case gets disposed, the better. In contrast, both the defendant rehabilitation and trial sufficiency policies should produce high bindover rates. This is primarily due to the effect of the intake process. The defendant rehabilitation model accepts few defendants for prosecution; those who are accepted are the "bad guys". Since this model deals with a smaller caseload, it can carefully prosecute the defendant considered guilty of more serious offenses. Little pressure is exerted by the system to prosecute at a lower level; hence bindovers should be high relative to the cases accepted. The trial sufficiency policy does not necessarily operate with a smaller caseload, its volume being in proportion to court capacity. Since all cases accepted for prosecution have their seriousness level set at intake, those designated as felonies will be processed accordingly, one result being a high bindover rate.

We have examined the rows to show how case disposition rates will vary according to the policy used. Now it is time to examine the policies in terms of their internal consistency. The reason for this is to help the prosecutor making a choice understand what he is to expect in terms of disposition and what strategies he should use to support implementing his policy program.

2. *Internal consistency of policies.* The disposition pattern of the legal sufficiency policy shows that the proportion of cases rejected for prosecution will be low because acceptance is contingent only on the presence of the elements of the crime. Conversely, the acceptance rate will be high. Whether diversion is used is not predictable. If such programs are available, in all likelihood they will be used to cope with an increasing caseload; if not immediately available, no attempt will be made to seek them out. To the extent possible, many cases will be referred to other criminal justice systems, particularly a lower misdemeanor court, city courts or administrative courts. Of those cases accepted for prosecution, many will exit at the preliminary hearing because they are weak or insufficient. To conserve resources, as few as possible will be bound over for grand jury action or for trial. To minimize bindovers, plea negotiation will become the predominant route to disposition. With plea bargaining in effect, the defendant has little incentive to plead guilty to the original charge. If a grand jury is available, it will tend to be used as a further screening and review mechanism resulting in either amended bills of indictment or a relatively high rate of no true bills coupled with a recommendation that these cases be referred back to the lower court for misdemeanor prosecution. Finally, for the cases that proceed to trial, the conviction rates will be relatively low, reduced by a high rate of dismissals.

The system efficiency policy operates in an atmosphere where success is measured in terms of dispositions occurring as soon as possible thereby reducing court time and costs. Extensive support is given to the intake and review function. However, as previously mentioned, the number of cases accepted or rejected will depend on the quality of the police work. Reducing the workload through extensive use of diversion programs is a sought-after goal. Where court systems exist which can handle additional cases, they too will be the recipients of as many of these cases as their jurisdiction allows. With the extensive screening performed at intake, few cases will be lost because of dismissals. Most cases will be disposed of by a plea bargain prior to or at a preliminary hearing, and every effort will be made to achieve this outcome. Thus few cases will be bound over. Those that do prevail through to a trial level will tend to result in conviction.

The defendant rehabilitation program focuses primarily on the defendant and attempts to place him in systems other than the criminal justice one. It is difficult to predict the rejection rate in an office operating under this policy, since it depends more on the type of crime prevalent in the community and the quality of the police work than the prosecutor's policy preference. Screening involves two queries in this intake process: first, to determine eligibility for diversion and second, if that is not possible, to determine at what level to charge, or whether the charge can be sustained. The goal, of course, is to maximize the treatment of the defendant through diversion. As a result, courts of another jurisdiction may be used to process the cases at a reduced level thereby punishing the defendant, but at a reduced level. For defendants accepted for prosecution, since their cases have been thoroughly reviewed, dismissals at a preliminary hearing should be low, and bindovers high. Whether the prosecutor participates in plea bargaining or whether the defendants plea to the original charge is not predictable. This

depends on the prosecutor's preference and court capacity. Finally, a high conviction rate should follow for those cases going to trial with few dismissals.

The trial sufficiency policy looks to the ultimate conviction of the defendant for the crime with which he was charged. As a result, weak cases and cases not able to be sustained in a trial situation should be rejected, and the number accepted for prosecution should be relatively low. It is difficult to predict whether the prosecutor will use diversion programs. He may feel that they are not relevant to criminal prosecution, or he may see them as an alternative to prosecution. In either event, their rate of utilization is not predictable since such dispositions are independent of the goals of this policy. A similar situation holds for the referral of cases to lower courts. If improperly submitted to his office for prosecution, or if there is a question of jurisdiction, he would tend to refer them to the appropriate court. Again, this rate would depend on circumstances beyond his control. Since the goal of this program is to charge properly at intake and to go forward with the case to conviction, dismissals at a preliminary hearing level are intolerable since they reflect inadequate or poor charging decisions. Likewise, pleas to reduced charges must be minimized or the intent of the program is defeated. A high bindover rate can be anticipated since the cases are solid. With little plea bargaining opportunity, pleas to the original charge become commonplace. For those cases which reach trial status, all efforts are focused on obtaining a conviction and minimizing losses through dismissals.

This examination of the typology showing the impact of policy on charging and dispositions provides us with a number of benefits.

- It demonstrates that there are choices available to the prosecutor in terms of what he would like to achieve.
- It shows that although different programs produce different patterns of case dispositions once the policy is taken into account, the pattern of dispositions is reasonably predictable and interpretable in terms of prosecutors striving to maximize desirable outcomes or dispositions and minimize undesirable dispositions of their cases.
- It illustrates the dynamics of the prosecutorial system, showing that the charging decision is not isolated but related to the entire prosecutor's office response.
- *Finally, and perhaps most importantly, it shows that a prosecutor cannot be judged by one measure alone (e.g., a dismissal rate, or rejection rate or by simple comparison to other prosecutors) but rather that he be judged in terms of what he hopes to achieve (his policy) and how closely case dispositions approximate the goal of his policy.*

C. Strategies To Implement Policy

We have seen that the policy the prosecutor follows in performing his duties directly affects the disposition of cases. Equally important is the necessity for using various strategies to ensure that the policy is being implemented and that it is effective. Strategies are defined as options available to prosecutors for use in obtaining program goals. At least three are immediately obvious because of controversy or publicity: they are plea negotiation, discovery and diversion. Examined independent of policy or the conceptual framework of decision-making, they are indeed controversial processes. For every prosecutor in favor of using one of these techniques, another can be found who is opposed. When viewed as part of the overall strategy to implement a prosecutorial system, however, they become rational and logical. This next section will examine these three processes to show when they can be used to support the prosecutor's program and when they are unnecessary or irrelevant. The assumptions presented are derived more from logic than experience. Clearly, they should be verified.

1. *Plea negotiation.* One of the most important strategies used by prosecutors in disposing of cases is that of plea negotiation or plea bargaining. Its use or prohibition of use is so controversial and has generated such heated discussion, that its role as a strategy to implement policy often has been overlooked. The abolition of plea bargaining by 1978 was incorporated into the National Advisory Commission on Criminal Justice Standards and Goals.[5] This recommendation generated so much discussion, controversy and argument that the issue dominated all other criminal justice issues at the national conference called to promulgate these standards.

Whether a plea to a reduced charge [6] as a result of a bargain is an acceptable form of case disposition should

[5] National Advisory Commission on Criminal Justice Standards and Goals: Courts Standard 3.1, Abolition of Plea Negotiation, p. 46.

[6] This is not the only indicator of plea bargaining. Plea bargaining can be defined as an acceptance by the defendant of an offer by the prosecutor to plead guilty for a consideration. In exchange for a plea, other charges against a defendant may be dismissed; the case may be referred to a lower court for a plea at that level; some diversion programs and even some pleas to the original charge can be part of a sentence bargain.

not be argued on its own merits alone. For heuristic purposes, the use and value of plea negotiation should also be examined in light of its ability to support the policy of the office.

Plea negotiation is a major force in implementing both the legal sufficiency and system efficiency policies although the reasons therefore differ. With the briefest review and only minimal trial preparation, assistants working under a legal sufficiency policy will negotiate a plea for a number of reasons: to correct an error in charging, to minimize the effort needed for more substantive case preparation, and most importantly, to reduce the ever-increasing case load. The early and speedy disposition goals of the system efficiency policy lend themselves naturally to the use of plea negotiation. In fact, this becomes the primary disposition vehicle because it leads to the fastest and least costly conclusion of a case. Care must be taken that its value as a strategy is not reduced by overcharging. Overcharging may involve either the filing of multiple counts or including every conceivable charge on a case. Its use as an inducement for a plea of guilty has been forbidden by article 350 of the American Law Institute Model Code of Prearraignment Procedures.

If the preferred goal is to treat the defendant by means other than criminal justice processing, the use of plea negotiation as a supportive strategy is misplaced. Whether the defendants who are processed under such a policy are allowed to plea bargain is probably related to a preference factor on the part of the prosecutor taking into consideration the court capacity. In any event, since the primary goals can be obtained without plea negotiation, the defendant rehabilitation policy does not require the use of this strategy.

At the other extreme, the prohibition of plea negotiation serves as a primary strategy in the trial sufficiency policy. On the premise that the original charge is accurate, and that a conviction at that level is sought barring unforeseen events, plea negotiation has no part in this process. As a matter of fact, under this policy, it is necessary to institute the tightest management controls to ensure that this strategy is not used. An example of this can be found in New Orleans where a plea to a reduced charge must be approved by the chief of the trial division and one of the three top administrators in the office, including the District Attorney himself. Where plea bargaining is either used sparingly or prohibited outright, it is not only essential that the system be tightly controlled to prevent its happening, but also that the cooperation of the court be obtained. In Detroit, the prosecutor's "No Reduced Plea" policy works only because once the plea discussions have been concluded without resolution and the case jacket stamped "NRP," the judges honor this decision and will not accept a plea to a reduced charge at the time of trial.[7]

When viewed as a strategy for achieving a specific program's goals, the use or prohibition of plea negotiation begins to become understandable. It is an excellent strategy to achieve the aims of legal sufficiency and system efficiency programs; it is not relevant to the tasks of the defendant rehabilitation policy, and it is counterproductive to the establishment and implementation of the trial sufficiency program.

2. *Discovery.* The implementation of discovery is a procedure whereby the prosecutor opens his case file to the defense counsel thereby disclosing the evidentiary strength of his case. Where discovery does not exist, the defense counsel is usually limited to the information filed with the court (usually contained in the accusatory instrument), and any information that he may glean from his client or from witnesses suggested by the client. In many instances, when discovery is not a practice in the prosecutor's office, the defense counsel may not even see a copy of the arrest report until it is entered as evidence, or know in advance the witnesses for the state.

The rationale for the origin and maintenance of this practice clearly can be traced to our system of justice since it is a natural outgrowth of the adversarial process. Yet with today's problems of increasing workload and with the expanding acceptance of alternative approaches to prosecution, arguments in favor of discovery become more persuasive. It is still subject to controversy, however, and no single standard has yet been developed. Grosman[8] in his book *The Prosecutor* in the context of examining the Canadian version of justice, presents an excellent discussion on the need for and the merits of implementing discovery.

The most commonly expressed opposition to the use of discovery is based on the prosecutor's fear that by exposing his case to defense scrutiny he may jeopardize his chances of winning. Indeed, this fear may be well

[7] While the purist might argue that there would be no necessity for plea bargaining if adequate court capacity were available, the realist would note that even under the calm conditions of a small town in a rural area, plea negotiation occurs—sometimes to force an informal diversion program ("if you keep out of trouble and don't come back again, I'll let you plead to a reduced charge"), sometimes as a rehabilitative device, and sometimes as a form of charity by not subjecting the defendant to further public embarrassment.

[8] Op. cit., Grosman.

justified if the cases accepted for prosecution are weak or have defects which may be revealed upon examination by the defense. The extent to which this fear is a response to the quality of the law enforcement activity (producing less well-made cases) or a result of the prosecutor's perception of his role in the adversary system has to be determined before a clear understanding of the reasons for opposition can be reached. While still to be verified, it seems entirely logical that the prosecutor operating with a policy of legal sufficiency (cursory review) would tend to be opposed to the implementation of discovery since his uncertainty about the evidentiary strength of his case should foster the need for secrecy. Under these circumstances, plea negotiation without discovery is like a poker game.

Where discovery is implemented as a strategy its results can be remarkable. Discovery changes the name of the plea bargaining game from poker to chess. With both sides of the adversary system acquainted with the facts and strength of the case, a far more rational determination can be made with regard to disposition. It has been observed in those offices where discovery is practiced, such as the Bronx and Kansas City, that pleas to the original charge increased and that pleas to reduced charges are raised to a higher level of seriousness of offense (in other words, the reduction is not as great). The importance of using discovery to assist with plea dispositions clearly indicates its use in the system efficiency model. Discovery becomes a critical strategy in speeding up the system and reducing workload.

Discovery need not be used solely to support plea negotiation. In fact, its value as a strategy transcends this single task. Discovery is a valuable technique for the prosecutor concerned with defendant rehabilitation. It is far easier to arrive at a treatment solution for the defendant if the defense, prosecution, court and as many other persons as necessary to make this determination are involved. Discovery as a communication vehicle establishes a foundation for better decision-making resulting in better treatment decisions. As a further example of the usefulness of discovery independent of its benefits to plea bargaining, one need only look at the trial sufficiency model. Since the cases accepted for prosecution are only those deemed sufficient and capable of sustaining conviction, a prosecutor operating in this environment is well advised to use discovery as a strategy to achieve the conviction goal or a plea to the original charge.

Although the National Advisory Commission addressed itself to the implementation of discovery and the safeguards surrounding [9] it, it did not view discovery as a strategy for attaining prosecutorial goals. When this view is taken, the controversy and confusion surrounding discovery are greatly reduced and the Advisory Commission standard can be implemented and evaluated in terms of what it will achieve.

3. *Diversion.* Diversion is a process whereby a defendant is referred to non-criminal programs for rehabilitation or treatment in lieu of criminal prosecution. The vagueness of this definition creates some problems when diversion is viewed as part of the prosecutorial process because it may occur at various points in the process. Pretrial diversion implies that the defendant does not proceed to an adjudication stage, yet diversion may also occur as a result of formal criminal processing but before conviction. The focus here will be on pretrial diversion since this is the discretionary decision which affects the largest number of cases. The volume of cases tends to decrease as the system processes them and the number of those eligible for diversion later in the system, after formal criminal proceedings, is proportionately fewer. While we recognize that there are many exceptions to this statement, for the purpose of discussion, pretrial diversion will be defined as that process which refers defendants to other programs before formal criminal processing is started. In this manner, diversion as a strategy is considered in terms of its impact on the intake, review and charging decision of the prosecutor.

Additional problems, created by the term diversion result from confusion between discussing diversion as a disposition and discussing diversion as a strategy. As a disposition, diversion is the "halting or suspending before conviction formal criminal proceedings against a person on the condition or assumption that he will do something in return." [10] Because prosecution is "halted", it is legitimately defined as a disposition. However, as an alternative route in processing cases, it can be considered as a strategy. We will examine it here as the latter.

The purposes for which diversion is used become of primary importance when considering it as a strategic device. Under different policies, diversion may be seen as an additional outlet through which cases can escape from a system under pressure. It therefore assumes primary importance for the system efficiency policy which

[9] National Advisory Commission of Criminal Justice Standards and Goals: Courts Standard 4.9, Pretrial Discovery, pp. 89–92. 1973.

[10] National Advisory Commission on Criminal Justice Standards and Goals: Courts, Chapter 2, Diversion, pg. 27.

seeks the fast disposition of cases for obtaining an efficient system of justice. Under such pressure conditions, the use of diversion as an outlet is a natural and logical consequence of the prosecutor's policy. The legal sufficiency model also operates within and perhaps even creates an atmosphere of pressure; but the pressure is focused on reducing caseload rather than on becoming more efficient. Hence diversion programs, if available, are used as a strategy to reduce caseload. Without doubt the defendant rehabilitation policy views diversion as its primary strategy. The overriding concern in this prosecutorial decision-making set is to place the defendant in the proper treatment program. It is difficult to determine the value of diversion for the trial sufficiency model since diversion is not essential to the achievement of convictions. One would think that diversion could be useful as an alternative to prosecution and probably would be used if available. But as a strategy for implementing these goals it is not necessary.

One must also take into consideration the populations which diversion programs serve and relate this to their availability for strategic use. Most diversion programs are geared to meet the needs of the youthful first offender in a less serious crime. Hence they serve as useful outlets in court systems that handle this type of offender (usually lower misdemeanor courts). It would be difficult for a prosecutor to proceed with a defendant rehabilitation program policy without adequate and diversified treatment and rehabilitation programs. The availability of these programs coincides with the success of implementing defendant rehabilitation policies.

Finally, note should be made of the use of referring cases to other court systems as a diversionary tactic. According to our definition, this is not considered diversion, since it does not involve the halting or suspension of formal criminal action, nor does it refer the defendant to noncriminal programs. Yet the referral of cases to other courts or judicial jurisdictions must be acknowledged as a legitimate strategy, since it functions in many offices as a primary means of reducing the workload of the office. This type of referral occurs especially when two or more court systems exist with concurrent jurisdictions over certain types of cases (usually, traffic and moving violations, and simple misdemeanors). In such instances, the agreements reached between the two systems in terms of prosecutorial jurisdiction may have significant impact on the caseloads of the prosecutors' offices and must be taken into consideration if the goals of the office are to reduce workload and increase efficiency in the system.

Figure 6 summarizes the strategies likely to be employed by an office to implement the office policy. Since the ultimate goal of the prosecutive function can be viewed in terms of case disposition, the strategies used to dispose of cases are largely dependent upon the policy of the office and the choices that are deemed suitable for and consistent with implementing the policy. It is essential then that any prosecutor searching for ways to implement his policy be aware of the strategies that are consistent with his aims and which increase his chances for effectively establishing and maintaining them.

D. Allocating Personnel Resources to Support Policy

No matter what policy is being implemented, work has to be distributed in a rational manner if the desired outcomes are to be attained. This distribution of work in terms of staff assignments is probably the most important part of the allocation of prosecutors' resources. The allocation of space, equipment, supplies and other resources follows the priorities of staff assignment. It is important to note that work cannot be distributed rationally without consideration of the external environment which may preclude many resource allocation options. For example, it would be difficult to organize an office around processing functions (wherein one or

FIGURE 6.—*Expected use of strategies to implement policy*

Policy	Strategies			
	Discovery	Plea Negotiation	Diversion	
			Other CJS	Non CJS
Legal sufficiency	Indeterminate	Yes	Yes	Yes.
System efficiency	Yes	Yes	Yes	Yes.
Defendant rehabilitation	Yes; to expedite treatment	Indeterminate	Yes	Yes.
Trial sufficiency	Yes; to insure adjudication	No	Yes	Yes.

two assistants handle a case all the way from charging, through pretrial, trial, and to disposition) without a court processing system geared to support it. Functional processing and the use of trial teams fluorish best when cases are assigned at the time of filing by the clerk of the court to a specific judge or specific courtroom, or when the prosecutor controls the docket.

Most prosecutive resource allocation plans are primarily responses to the external environment. Thus, while theoretically many plans are available, in practice the options open to any one specific prosecutor are limited. From a practical view, one must account for resource allocation responses due to the characteristics of the police, defense, and courts before initiating a plan. However, even though the external environment may cause the prosecutor to respond in a specific way, there are patterns that emerge and that are internally consistent with the implementation of policy and charging programs.

It is interesting to note that each policy focuses attention and effort on a different part of the prosecutive process. The trial sufficiency policy, that of not losing cases and obtaining convictions, focuses on the end of the process, the trial. On the other hand, the system efficiency and defendant rehabilitation policies are front-end oriented while the legal sufficiency policy focuses on the middle or processing stages. Because of these different emphases, the case for a rational distribution of the prosecutor's limited resources starts with a recognition of the policy being pursued.

This section briefly examines some of the ways the personnel resources in the office can be distributed to ensure consistency with policy and the prosecutor's priorities. It focuses only on staffing requirements for those areas under the prosecutor's immediate control—charging, case assignment for trial preparation, and sentence recommendation. It recognizes the impact of the external environment on modifying some of these allocation patterns. Nevertheless, the presentation made here is to show that conceptually, as the priorities of the office vary, so too must the allocation of resources and the distribution of work.

1. *Charging, decision and review stages.* Much attention has been given both here and in other studies to the importance of timing and quality of police reporting to the charging process. Equally important, however, are the qualifications of the persons making the charging decision. Almost without exception, the use of inexperienced assistants at this stage has been deplored but rationalized by discussing the seemingly insurmountable problems of assigning and retaining experienced, senior level assistants in the screening unit.[11] It is our opinion that there are some systems of prosecution that require only the use of inexperienced assistants or even third year law students and other systems that require the use of experienced assistants. Since staff allocation responses need to be consistent with the priorities of the prosecutor, he should be aware of the personnel qualifications required to best support his charging program.

A justification for the use of young, inexperienced legal support in the charging process is provided by considering the charging and review requirements generated by the legal sufficiency policy. Under that policy the case is reviewed only for the presence of necessary elements, and if present, accepted for prosecution. This task can be performed easily by even third year law students. With this policy there is little need for experienced personnel except in a review capacity. Indeed, to use experienced assistants for this type of screening is to commit the error of underutilization. Additionally, one must remember that this type of prosecutorial system is most often found in the lower misdemeanor courts. Here cases are minimally supported in the police reports. The information available to the assistant may consist of only the briefest description of the offense, defendant, and other necessary information for processing, and the processing conducted on an assembly-line basis. Neither time nor information warrant the assignment of experienced personnel to perform the charging function. In fact, this can be quite reasonably accomplished by third year law students with their work reviewed by a newly trained assistant.

While a justification can be made for the utilization of the young, inexperienced assistant in the charging process under the legal sufficiency policy, it does not

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[11] "Care must be taken to assure that the screening decision is not left in the inexperienced hands. * * * This is undesirable unless there is direct supervision by more experienced personnel." National Advisory Commission on Criminal Justice Standards and Goals: Courts, p. 25.

See discussion in *The Prosecutor's Screening Function: Case* and Control. National District Attorneys Association and National Center for Prosecution Management, October 1973, pp. 17–21.

"This (screening) is not a position into which a young, inexperienced district attorney should be thrust. * * * Therefore, the screening function should be performed by the most experienced member of the district attorney's office." *Screening of Criminal Cases. Alternatives to the Criminal Warrant Process: The Prosecutor's Discretionary Decision to Charge,* Leonard, R. F. and Saxe, J. B., National District Attorneys Association, Chicago, Ill. p. 69.

apply to the other three policies under discussion. For these other policies, personnel experience requirements are extensive although varying in nature depending on the aims of the prosecutor. If the goal of an office is to reduce the caseload and to speed up the system, we have seen that screening plays a critical part in initiating the success of such a program. The requirements in this program are to ensure that:

- weak cases, or those without prosecutorial merit, are not allowed to enter the system;
- cases with concurrent jurisdiction in other courts can be referred there for prosecution;
- cases that can be diverted to other treatment programs are so diverted, and
- cases charged are likely to have an early disposition, primarily by plea.

With these requirements, it is obviously essential that the intake unit be staffed by assistants who have had extensive trial experience to make the necessary legal judgments and who also are familiar with the rest of the criminal justice system so that coordination and liaison with the other parts can be developed and maintained. There is little need for internal review of these charging decisions, first because the assistant is so experienced, and second, because review is not considered necessary so long as he is successful in reaching early disposition of most cases either by transferring them out of the system or by means of guilty pleas. This does, however, indicate the need for a monitoring mechanism to minimize the chances that the charging process be abused. A discussion of these mechanisms will be found in Chapter V.

The prosecutor who assumes that the major aim of the criminal justice system is defendant rehabilitation rather than punishment occupies a sensitive position. The delicate decisions of whom to prosecute and whom to divert can lead to potential danger for an elected prosecutor. There is always a certain element of risk in diverting defendants into treatment programs. Therefore, the prosecutor must be confident that his assistants are competent, experienced, and ideologically in agreement with his philosophy. For these reasons, the charging assistants should not only have extensive trial experience but they should also demonstrate a broad sensitivity comparable to that provided by, for instance, a social work background. The decisions resulting from this screening activity, like the legal sufficiency policy, need little review. This is because the diversion programs themselves act as review and controlling agents. The fact that a defendant is diverted to a treatment program is no guarantee that he will be accepted. Each program has its own intake and acceptance criteria which act as controls over the prosecutor's decisions. Cases not accepted are sent back to the prosecutor for further action; the control on this screening function, thus, is external to the prosecutor's office.

The trial sufficiency policy requires the utilization of the most experienced trial lawyers to make the charging decision. It also requires that this charging decision be imbedded in a mesh of review and control functions because once the charging decision is made to prosecute a case, the strategy is set; the case will go to trial and a conviction is expected. The initial charging decision in this program is important because it closes down so many options available under other policies that it must be accurate, and reviewed by as many people as possible to ensure its accuracy. At the least, the decision should be made by an experienced trial assistant; under optimal conditions, it should also be reviewed by other experienced trial assistants to minimize the chances of something being overlooked at the initial step.

2. *Case assignment for trial preparation.* Once a case has been accepted for prosecution, has survived the preliminary hearing and, where grand juries prevail, the indictment, it is ready for trial preparation. Under ideal conditions, trial preparation involves reviewing the evidence to assure that all necessary evidence such as chemist and coroner reports is present and that the chain of evidence is not broken. Where additional investigation is necessary to ready the case for trial such as locating and interviewing witnesses, it is usually performed by investigators attached to the prosecutor's staff. The assignment of the responsibility for trial preparation to assistants and other supporting personnel or the prosecutor's staff is totally under the prosecutor's control. How he organizes his office to respond to his priorities is critical to the success or failure of his effort. Again, as with the assignment of personnel to intake and review, these assignment patterns differ according to prosecutorial approach. Our examination will concern itself with large offices since only they have the potential resources to produce a variety of responses. Smaller offices usually do not possess resources adequate for organizing more formal trial preparation units.

In offices where little expectation exists that a case will survive to a trial stage, special accommodations have to be made. Both the legal sufficiency and the system efficiency policies operate with the expectation that after charging a bargain can be struck. Failing this, the remaining cases are transferred to other assistants for trial preparation. In order to operate

smoothly under these conditions many prosecutor's offices have responded organizationally by creating special units to handle these cases. (The case is first handled by the complaint room assistant, followed by the assistant at first appearance, and the assistant at preliminary hearing or grand jury and arraignment.) Sometimes the prosecutor focuses on the entire prosecution effort by dividing his office into crime divisions, (for example, homicide, narcotics, sex and vice, property, etc.) and distributes the caseload accordingly regardless of complexity or priority. Other offices have responded in a more selective fashion, skimming off the most serious cases for special attention and prosecution (independent of crime type) and letting the rest flow through the process with minimal attention. Examples of this kind of response are noted in the use of special trial teams, major offense bureaus, major violators units, and more recently, the career criminal program. No matter which approach is followed by the prosecutor, it reflects an adaptation to his goals. Since neither policy envisions a trial as a preferred end product, there is only minimal need for asistants with trial experience.[12] Most of the cases can be handled by assistants with little trial experience and with supervision. Those who are experienced and who must handle the relatively few complex cases are located organizationally either as division heads or senior assistants or within the special prosecution units like the major offense bureau.

Case preparation under the defendant rehabilitation program requires few assistants with a moderate amount of trial experience. Since the aim of this program is to divert the majority of the cases from the criminal justice system, these few remaining can be considered serious enough for prosecution and hence will have to be prepared by the assistants who have had some trial experience. If plea negotiation is used, the requirements for trial experienced assistants is less than if plea negotiation is withheld. Organizationally, since the office is geared toward the early diversion of defendants (at the front end of the system), case preparation and trial activity can be handled by a generalized "criminal trial division." Except for unusual cases, there is little need for selective prosecution units either by crime type or by seriousness of the defendant.

Finally, at the other extreme of trial experience requirements falls the prosecutor operating with a trial sufficiency policy who must have assistants with extensive trial experience and staff resources able to support the assistants in investigations, evidence preparation, interviewing and paperwork. Since it is expected in this end-of-the-process oriented system that each case accepted will be judged on its merits, emphasis is placed on competent preparation of trial and experience in evaluating cases. Since all cases are expected to be trial-worthy, the organization of the office can reflect the essentially dual functions performed, an experienced, well-manned intake and charging unit, and and an experienced criminal trials division. Whether the latter is specialized by crime or seriousness of the offender is based on the prosecutor's individual preference and the characteristics of his community.

3. *Sentence recommendation.* The common impression of most persons is that the responsibility of the prosecutor ends with the disposition of the case, a plea, a conviction, acquittal or dismissal. Yet, another activity is still within the prosecutor's legitimate authority and may have great impact on the sentence given to a convicted defendant. This is his authority to make recommendations at sentencing. The recommendation is based upon his knowledge of the defendant, the defendant's background, the seriousness of the offense and the risk presented to the community by the defendant. Not all prosecutors use this power.[13] In the 1972 NCPM survey 90 percent of the prosecutors reported having such authority, yet only 44 percent used it consistently (90% of the time or more) in felony prosecutions. While data do not exist to substantiate these insights, it is our belief that sentence recommendation is used when it is relevant to the prosecutor's goals and that under other circumstances, the necessity for having an assistant prepare for and attend the sentencing procedure is considered wasteful of the prosecutor's limited resources. To support this belief one can glance at the statistics kept by prosecutors. In general, all have data on conviction rates; even those who do not keep accurate records have a feeling for their conviction rate. Yet few prosecutors collect data beyond the adjudication results. Those who do collect sentence data are probably those who participate in sentence recommendation.

It would be expected that offices operating under a legal sufficiency or a system efficiency policy would rarely use the sentence recommendation power of the prosecutor. The legal sufficiency program operates generally in a misdemeanor court environment, tends toward assembly-line processing of cases, and disposes

[12] It is an interesting question whether the character of the resources in an office (young, inexperienced assistants with high turnover rates) creates a policy which accommodates to this environment or whether the policy creates and supports the environment.

[13] Op. cit. NCPM First Annual Report.

of most cases by means of pleas. With limited prosecutorial resources, and an inherently low penalty upon conviction (jail or fine), there is little incentive or need to use this authority or assign personnel to this function.

Where plea negotiation is the primary means for disposing of cases and the emphasis is on reducing time to disposition and lessening workload, a successful prosecution program depends on the disposition of cases not the outcome of defendants' sentences. Therefore, unless there is a need to bargain for a sentence and this bargain is brought in front of the court, one would not expect that much value would be obtained from an assistant being present at sentencing.[14]

A prosecutor operating with a policy of rehabilitation through diversion, must by necessity operate with the participation and cooperation of the court. The referrals, treatments, decisions, evaluations, in sum, the activity of the prosecutor's office, require extensive liaison with other components of the criminal justice system as well as the community. Since some of the diversion decisions may be made after adjudication, it is necessary that the prosecutor be represented at sentencing in these cases to ensure that the sentence is consistent with either the treatment program or the level of punishment desired. In some offices, where there are no formal diversion programs available, the prosecutor may use his sentence recommendation power to obtain dispositions such as "probation without conviction" that act as substitutes for diversion programs.

The use of the sentence recommendation authority of the prosecutor can be viewed in another way, as the completion of the prosecutorial cycle, from charging, to preparation, to trial, to conviction, to a sentence consistent with the charge. This cycle is most easily identified in offices where the initial charge, unless exceptional circumstances prevail, is the adjudicated one, and the sentence asked for is consistent with the charge. Processing a case through the sentencing stage then becomes as natural a part of the prosecutive process as any other part. The investigative and other support personnel to the trial lawyers develop the information that forms the basis for the sentence recommendation during the natural course of their work. As a result, the need for additional work and manpower is not present and presents no problem to the office. Under these circumstances, sentence recommendation as an activity in the prosecutors' office is not only relevant to his goals but is identified in terms of the result of his work.

Figure 7 summarizes the resource allocation needs facing a prosecutor considering one policy or another. Although this discussion has been necessarily brief, set forth to make the prosecutor aware of staffing requirements as he evaluates the policies, it does show how staff needs to be distributed to be consistent with the policy and priorities of the office.

E. Summary

This chapter addressed itself to identifying the existence of various types of prosecutorial policies and discussing the impact of these policies on the criminal

[14] Exceptions to this procedure may exist within special prosecution units (like major offense bureaus) which can operate within the legal sufficiency and system efficiency environments. These specialized units may exercise their sentence recommendations authority to produce another measure of success for their performance, namely how long a sentence the defendant received; with fewer cases selectively chosen, manpower is available for this procedure.

FIGURE 7.—*Expected patterns of resource allocations by type of policy*

Policy	Resource allocation needs			
	Charging		Case preparation for trial	Sentence recommendation
	Minimum qualifications for charging	Personnel needed to review of charges	Trial experience necessary	Personnel needed for sentence recommendations
Legal sufficiency	Paralegal; 3d-year law students, new assistants.	Yes	Minimal	None.
System efficiency	Trial and criminal justice system experience.	Not necessary	do	None, unless basis for plea bargain.
Defendant rehabilitation.	Trial and social work background.	do	Moderate	Yes, to insure consistency with treatment.
Trial sufficiency	Extensive trial experience.	Yes	Extensive	Yes, to insure consistency with charge.

justice system. We have been able to show that policy does exist and is translated into action for the first time at the intake and charging stage. Its impact can be measured by the case disposition patterns in the office; this demonstrates that charging cannot be considered as an isolated incident. It is instead the first step in the prosecution process. It sets the process in action and determines, in part, the results of pretrial screening decisions reflected in the dispositions. Since the charging decision reflects the policy of the prosecutor, it is made in reference to the desired outcome. Each policy has a different set of preferential outcomes: the legal sufficiency, to accept a case if the elements are present and then dispose of it to reduce workload; the system efficiency, to speed up the system by reducing court backlog through screening, diversion and fast and early dispositions; the defendant rehabilitation, to minimize the defendants being processed through the criminal justice system; and the trial sufficiency, to seek conviction if the case is accepted.

We have also seen that if some dispositions are more desirable than others, achieving them affects other outcomes.

For example, where plea bargaining exists, a high rate of pleas to the original charge is not likely to occur. On the other hand, some actions cannot be predicted because they occur independent of the policy or because they are related to external circumstances. For example, the establishment of a well-supported and experienced screening unit cannot necessarily produce predictable rejection rates. Our comparison of the different policies shows that the prosecutor does indeed have a choice and that the consequences of his choice are reflected by different patterns of dispositions. *Because disposition patterns vary by policy, the most important finding is that the prosecutor cannot be evaluated on the basis of case dispositions unless we know what he is attempting to do.*

Knowing what he is attempting to do, then leads to the ability to see how well he is doing it. We have seen that even though policies vary, and so the dispositions, once a policy has been selected it is internally consistent. This means not only that one can predict expected outcomes for cases but also that one can identify the strategies which are most supportive of the chosen goal. The strategies that vary by policy are plea negotiation, implementation of discovery, and diversion. Discovery is a natural strategy to achieve the goals of efficiency, rehabilitation and trials since it provides knowledge to the decision makers. Plea negotiation provides a necessary outlet for the overloaded system created by a legal sufficiency policy and a swift disposal route for the efficient processing of cases. Diversion is a strategy suitable to all policies although the reason for using it will vary by policy. The employment of a particular strategy by a prosecutor must be consistent with his goals or it may result in unnecessary work, or worse, in a procedure which would be counterproductive to his goals and priorities.

As the strategies are consistent with policy, so too are the resource allocation patterns. In the areas most truly under the prosecutor's control, how he distributes his work among personnel must be consistent with what he hopes to achieve. The three major areas of interest here are the personnel requirements for charging, case preparation for trial, and sentence recommendation. We have seen that the requirements for the charging unit which is the first translator of the policy depends on the policy. For cursory review, less experienced assistants can be used than for a charge that is to be the basis for expected conviction. The decision whether a case is negotiable and at what level it should be charged can only be made by assistants with trial and bargaining experience. Finally, the delicate decisions of who to place in a diversion program should be made only by asistants who are knowledgeable about the system and also reflect the philosophy of the prosecutor.

Depending upon what the prosecutor hopes to achieve, the rest of the office can be structured to meet these needs. Trial experience for case preparation is necessary only in offices oriented toward a trial environment, or in large offices where the work is organizationally distributed to skim off those few cases which seem destined for trial, for assistants handling trial-bound cases. Finally, we have shown that the assignment of personnel to sentence recommendation activity depends on the resources of the prosecutor and whether making recommendations at sentencing is important to the performance of his role.

If, in fact, as we have suggested here, policy plays such a critical role in the prosecutive system, affecting the outcome of cases and suggesting the use of some strategies and personnel instead of others, then it seems that one of the major tasks facing a prosecutor is to ensure that his policy is uniformly and consistently applied by his assistants. The next chapter will discuss methods available to ensure fairnes in following a policy, and ways to measure and monitor the effect of the policy once implemented.

CHAPTER IV. UNIFORMITY, CONSISTENCY, AND IMPACT IN PRETRIAL SCREENING

A. Introduction

The vast amount of variation observed among pretrial screening programs raises the question whether principles or guidelines for evaluation can be developed which would apply generally to individual pretrial screening programs. We believe that this question can be answered affirmatively. We recognize that special evaluations can be designed for an individual project that would not be applicable to other pretrial screening projects. However, our focus, in this chapter, will not be on these special variations but rather on the basic guidelines and principles useful for evaluating screening programs. These principles focus on the need to monitor the charging decisions for uniformity, consistency and their impact on case dispositions. Guidelines can be developed if they are based on functions that exist in every office, independent of type of office structure or organization. The obvious function meeting this criterion, for our purposes, is that of decisionmaking. The adoption of evaluation techniques keyed to decision points is a practical one since the charging decision represents the first, and perhaps most important, use of the prosecutor's discretionary power and sets the course for subsequent decisions in the prosecutorial process. These initial decisions, placed within an organizational structure called a pretrial screening unit, must meet three conditions:

- The initial charging decisions must be consistent with the prosecutor's policy.
- The decisions must be made uniformly by the assistants.
- The impact of these decisions must be evaluated, primarily, in terms of final dispositions.

This chapter addresses itself to the above three requirements as they apply in an individual prosecutor's office operating with a pretrial screening program. Before these requirements are examined, a brief discussion is presented of the economic benefits that accrue to a prosecutor implementing a pretrial screening program in an office where none existed before. The development and use of a decision flow chart to describe an office is then discussed. Finally, the need for ensuring uniformity and consistency in the decisionmaking process is explored and the types of information necessary to measure the impact of the charging policy are identified.

B. The Economies of Pretrial Screening Programs

Notwithstanding the wide variety of screening programs that exist throughout the United States, there is unanimous agreement that the institution of a screening program in a prosecutor's office makes a vast difference in his ability to provide adequate prosecutorial services to the state and to protect the public.

The American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals and the other national commissions, all support the use of pretrial screening as a means of providing economies to the system. The exposition of the economies to be derived from instituting pretrial screening programs has been the major justification for these programs. Prosecutor screening saves time and money.

> "When weak cases and cases which don't warrant prosecution are removed from the docket, it eliminates the need for judges and other court personnel to devote time to them. In this, as in any other profession, time saved is money saved. When civilian witnesses and police officers are not required to appear, it not only translates into savings on witnesses and police overtime, but allows civilians and police alike to use their time in more productive ways * * *." [1]

There are quantifiable economies resulting from implementing pretrial screening programs which reject insufficient cases. These economies can be translated into explicit savings in court hearings or reductions in case backlog, police overtime, witness fees, and other system support personnel. Those offices that are not

[1] David Rossman and Jan Hoffman, *Intake Screening: A Proposal for Massachusetts District Attorneys,* Center for Criminal Justice, Boston University, 1975.

screening cases prior to filing are suffering from the effects of "dumping garbage" into the criminal justice system. As a result, indictments may be pending for over a year, the courts are backlogged, and the prosecutor may be forced into the potentially dangerous position of having to dispose of cases with cheap plea bargains, or of losing cases because they were so old that witnesses disappeared or their testimony obscured. The failures occur

> "* * * because most offenders are processed as if their case would be disposed of by trial. These cases, therefore, pass through unimportant or unnecessary steps before disposition. As a result, the time and effort of judges, district attorneys, defense counsel and police are wasted. Each case which is mistakenly introduced into the system drains the resources which could be better applied to those cases which require the criminal justice process. Screening, properly implemented, would dispose of those offenders who should be dealt with outside the criminal justice system. It would aid in the early identification of pleas and possible diversions. This would allow a pure trial docket which could then be addressed in a qualitative manner, whereas the emphasis today is on quantity." [2]

It is not our purpose here to explore further the economies to be derived from the institution of pretrial screening programs, since they are well-documented in other works. They are a primary consideration for the prosecutor and constitute the best reasons for moving to a prosecutive system that screens cases. Instead, we have chosen to focus on the requirements for consistency and uniformity that are generated once pretrial screening has been implemented and on the techniques for evaluating whether the basic requirements of the program are being met. Since we have defined the prosecutor's decisionmaking function and are focusing on the decisions made at the charging level, it is necessary to explore this concept and see how it can be used to look at the impact of the charging decision.

C. Flowcharting the Decisionmaking Process

The prosecutor's decisionmaking process starts with the charging decision and ends at a disposition. The quality of decisions have a direct impact on the quality of justice. Decisionmaking does not occur in a vacuum, but within an ever shifting environment. To make judgments about the quality of decisions one must know the context in which they were made. We believe that *if each prosecutor would chart the flow of decisions, throughout his office, and place them in proper context, he would not only see the impact of the decisionmaking chain on final dispositions, but also could identify steps in the process that need strengthening.* This is not a difficult task as the following description of the Orleans Parish decisionmaking process will illustrate.

Figure 8 shows a decision flow chart for the Orleans Parish justice system that was developed by the author in 1975 as part of the Bureau of Social Science Research's Phase I Evaluation Study of Pre-Trial Screening. It illustrates the principles and conceptual framework needed to evaluate decisions occurring over time in a process. The chart incorporates these concepts through the row and column identifiers. The columns are agency identifiers and represent the various phases through which a case may flow, from the law enforcement intake level through the prosecution and judicial process. It can be seen, for example, that the Magistrate section of the District Court generally contacts the defendant twice (see columns 2 and 4). Thus the agency identifiers (columns) quickly portray the nature of the criminal justice system in a particular jurisdiction.

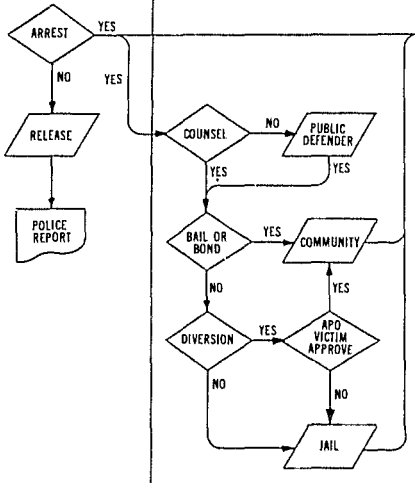
The rows represent the various parts of a decisionmaking process. They identify who the decisionmakers are as well as who participates in the decisions, what information is available to the decisionmaker, what decisions can be made, what courses of action are available for selection and how often they are used. With this information, one can easily understand how decisions are made at any point in the prosecution process and the location of decision points that are critical to a desired disposition.

The first row identifies what persons are present when decisions are being made. The asterisk identifies who is the decisionmaker or the primary decisionmaker, since sometimes the decision is subject to review. It is important to identify who the participants are at a decision point since:

- the scope of the information may change as the participants change
- the personnel utilization patterns documented here can provide a basis for evaluation and/or change
- the scheduling of the participants' presence can be improved or changed if necessary.

[2] James Garber, *Screening of Criminal Cases,* "Screening of Criminal Cases and Recommendations" National District Attorneys Association, Chicago, Illinois, p. 52.

Figure 8 SAMPLE PRE-TRIAL SCREENING DECISION FLOW CHART

AGENCY	NEW ORLEANS POLICE DEPARTMENT	DISTRICT COURT MAGISTRATE SECTION	NEW ORLEANS DISTRICT ATTORNEY INTAKE DIVISION		DISTRICT COURT MAGISTRATE SECTION	NEW ORLEANS DISTRICT ATTY GRAND JURY	DISTRICT CRIMINAL COURTS
1 PERSONS PRESENT (* = Decision-maker)	*Arresting Police Officers (APO) Detective	*Magistrate APO Defendant ADA Pre-trial release	*Assistant District Attorney (ADA) Chief of Intake APO or Detective	Also for Capital Crimes: Investigators Victims Witnesses	*Magistrate APO Defendant ADA Defense Counsel Victim Witness	*Grand Jurors ADA APO/Detective Victim/Witness	*Judge ADA Defense Counsel Defendant Witnesses
2 SET OF INFORMATION	Arrest Register Rap Sheet Police Report	Police Report Arrest Register Rap Sheet	Police Report Arrest Register Rap Sheet Detective's Report Release Decision DA Investigators Report (optional)	Victim/witness Statements	Complaint	DA Case Folder (includes all previous reports, statements, investigators reports evidence, etc.)	DA Case Folder
3 DECISION FLOW							
4 CHOICES	Arrest Release	Indigent Defense Counsel Privately Retained Counsel ROR Diversion Release Jail Other	Divert (Misdemeanor) Accept Refuse 1. Insufficient evidence 2. No Crime 3. By Victim 4. Justifiable 5. Illegal Search 6. Other Cases Pending 7. Other Court 8. Diverted 9. Other Reasons 10. Unknown		Bindover Set for Trial Dismissed Other	Indict No Bill 1. Reduce to misdemeanor 2. Refer to Municipal Court 3. Refuse 4. Other	Dismiss or Nolle Prosequi 1. Lack of evidence 2. Victim refuses to prosecute 3. Victim witness not available 4. Prescribed 5. Def. guilty in another case 6. Def. informer or state's witness 7. Motion to supress sustained Plea Guilty as charged Plea guilty to reduced chg Acquittal Conviction Other
5 IMPACT (Statistics Year ending March 1975)	Felony and Misdemeanor arrests 13,093Δ	Not Available	Total Reviewed - 11,810 cases, 13,093Δ Accept - 6,344 cases (2,918 M, 3,426 F), 7,460Δ Refused - 4,476 cases, 5,633Δ		Bindovers approximately 650 per mo Probable Cause Hearings approximately 350 per mo	Presented - 120 True Bill, Approx 114 No True Bill, Approx 6	Plea Guilty - 2315Δ All Trials - 1155Δ Acquittal - 350 Conviction - 743 Other - 62 Nolle Prosequi - 801Δ Lack of evidence - 169 Defendant guilty in other case - 167 Victim refuse to prosecute - 105 Motion to suppress - 87 Other - 255
6 OTHER INPUT			Citizens complaints to Fraud Section. If valid, referred either to New Orleans P.D. or Grand Jury. *10 months ending 3/31/75 *Total Reviewed 2773 Referred to other agencies 2036 Complaints Refused 62 Total Accepted for Investigation 674 Complaints Closed by Prosecut. 12 Other dispositions 335			Grand Jury originals based on DA investigation	

The identity and role of the participants in a decision varies not only within an office but among offices. In Washington, D.C., the U.S. Attorneys' Office, Superior Court Division, generally decides what charge or other intake action is to occur based on the information presented (both written and oral) by the arresting police officer. In Kansas City, the District Attorney's office normally relies on detective reports (written and oral) and defendant interviews to reach a charging decision. In Milwaukee, the assistant reaches his charging decision based on information presented by the arresting police officer, other officers involved in the offense or arrest, the defendant, complaining witness or victim, other related witnesses and interested parties. As the case proceeds through probable cause hearings, pretrial conferences, motions and eventually to trial, the participants and the decisionmakers change acording to the purpose of the action.

The second row identifies the written set of information which is available for each of the decisionmaking steps. Under normal circumstances, as the case proceeds across the processing system, more and more information becomes available; the detective reports come in, the rap sheet is received from the FBI, additional evidence such as contained in chemist, narcotics and coroners reports accumulates as the case progresses over time. The flow chart reflects this progression and provides an indication of where and when information enters the process.

The third row of the flow chart specifies the decisions that are made in each of the various processing steps. It shows that the decisions are not independent in nature but interactive. Each decision is influenced by some prior decision and subsequently influences other parts of the system. Thus the decision at a probable cause hearing to dismiss a case for insufficient evidence may reflect the quality of the decisions made at the charging level or even the quality of the police arrest decisions. A decision to reduce a charge from a felony to a misdemeanor for a plea reduces the caseload in felony court by one, increases misdemeanor cases by one and reduces court trial time by pleading.

In addition to identifying the actual decisions, any control points that affect the decision flow should be identified. We have stated that the purpose of developing a decision flow chart is to place decisionmaking in context so that its effect on final dispositions can be observed and the steps in the process needing strengthening can be identified. *Wherever decisions are made that may change the expected final disposition of a case without a review or approval procedure, the foundation is laid for inconsistencies with office policy or a lack of uniformity in treatment.* For example, if a conviction on the original charge or a plea to the original charge was expected, a plea to a reduced charge would constitute a change in expected final disposition. Review and approval procedures should operate at each decision point where such changes could occur so that the decisions can be monitored and placed under control. Usually these control points exist internally in the prosecutor's office. But sometimes, they may exist externally in the form of approvals and/or notifications to other agencies. A common example of this type of external control can be found in offices where the defendant's charges are dropped or reduced after restitution has been made *and* with the victim's approval. External agency approval exists in situations such as pretrial diversion, when the treatment program has the final decision in accepting or rejecting the defendant. Finally, it should be noted that the decision flow chart does not have to be drawn to include every exception to a rule. If this happens, it becomes so complex as to be worthless for this task. The flow chart of decisions as they *normally* occur, provides the starting point for the development of policy statements and ultimately manuals.

The fourth row specifies the choices available to the decisionmaker at each step in the process. These choices often vary among offices or may emerge at different points in the case flow in different systems. For example, a plea as a result of negotiation may occur at any step but with vastly different effects. Depending on the nature of the program, diversion may be available at only a few points. It is important to know all the choices available to the decisionmaker so that the frequency of their use can be counted. These frequencies set the foundation for establishing a case reporting system in an office. As cases flow through the pretrial screening program, data on the decisions made or options exercised accumulate and provide a base for developing statistical reporting systems for management use.

The fifth row, called "impact", identifies the areas where data should be collected to permit a proper evaluation of the system. It also demonstrates the unfortunate fact that the categories used for disposition reporting in most prosecutors' offices and judicial systems today are too broad. We have seen that it is not enough to know the number of cases disposed of by a plea of guilty, it is also important to know at what stage the plea was accepted (for example, at the committing magistrate level, very early in the system or at the first day of trial after the case had languished in

the system for a period of time). Dispositions should be counted, reasons reflecting accountability should be captured, and the stage at which the disposition occurred should be identified. For example, we have noted that one primary measure of the performance of system efficiency is the time and location of disposition. A plea at the committing magistrate level is considered more successful than a plea on the day of trial. Continuances reflect a failure in efficiency if the continuances are due to factors under the prosecutor's control, such as the government's witnesses not notified. Yet continuances, for example, that are due to defense counsel unavailability cannot be considered as a prosecutor breakdown in seeking efficiency. To evaluate the effect of dismissals, one must know not only where they are occurring in the process, but why. Only with this type of information, can improvements for the system be rationally planned and implemented. The value of this part of the flow chart lies in its ability to identify where data should be collected as well as what would be available. It provides the basis for the design of a data collection system.

The final row in the flow chart, labelled "other input," reminds the prosecutor that other workloads existing in the office account for additional strain on his resources. For example, in the New Orleans prosecutor's office a citizen complaint unit reviews nearly 3,000 complaints a year. The impact of these additional workloads must be considered. In some instances that consideration may even require developing separate decision flow charts for these collateral processes.

With a decision flow chart of his office, analogous to the one presented in Figure 8, the prosecutor can see that the pretrial screening decision of an assistant prosecutor is based on a set of information (police reports, past history of the suspect, strength of the case, etc.) from which he or she can make certain choices, choices which are tempered by procedural rules and the policy goals of the District Attorney. The rules are usually straightforward, and the choices are usually quite limited. Either the case is accepted for prosecution, in which event the level of charge must be determined; rejected, in which event the reason why must be delineated; referred to another sector of the criminal justice system, or diverted to some non-criminal treatment program. The value of the decision flow chart, in addition to visually providing the prosecutor or his first assistant with an overview of the operations of the office, also lies in its ability to show the effect of changes in policy or procedure. For the prosecutor who is seeking to improve office procedures, or wishes to change policy, the flow chart identifies those decisions most critical to meeting the aims of the program and sets a basis for a "before/after" comparison. The decision flow chart gives the prosecutor another way of examining his office, focusing on some of the most important aspects of the prosecutive function, namely decisions.

The underlying premise upon which pretrial screening decisions are based is the policy of the office expressed in terms of what results are expected. Usually, only the District Attorney or his first deputy views the office as a whole. It is therefore the prosecutor's responsibility to set the overall goal, as discussed previously in chapters two and three. Once set, the next question is to what extent do the screening decisions (and, by extension, all decisions) reflect the prosecutor's policy?

D. Decisionmaking Consistent with Policy

The existence of pretrial screening programs requires that the charging decisions be consistent with prosecutorial policy. Inherent in this requirement is:

- the need to know how policy is transmitted, and
- techniques to measure the extent of the transfer.

The promulgation and communication of policy to the staff are essential to case processing since decisions must be made with reference to prosecutorial preference. Thus the issue of consistency in decisionmaking becomes relevant. Consistency can be examined from two perspectives; consistent decisionmaking by an individual over time, and consistency among many decisionmakers. In the short run, an individual assistant may make decisions that are consistent with other decisions related to the same policy. Over a longer period of time, these decisions may appear to be inconsistent. This could be due to a number of factors. For example, the policy guidelines may have been obscured as exceptions are added to the rule; the assistant may mature in his decisionmaking as he gains experience; or even improvements in the system may occur providing him with better or more accurate information. Thus, consistency cannot be an absolute, but one can expect that it will operate within broad guidelines and be explainable if it appears to change over time.

The focus of this report, however, is on consistency among decisionmakers. Under these conditions, the issue of consistency of decisionmaking with policy is primarily relevant in large offices (with about 15 or more assistants) where communication is complex. It does not apply to smaller offices. The size of the office is a prime determinant in the transmittal of policy and

must be considered in attempting to develop consistent policy applications. About one third of the prosecutors' offices in the United States are staffed by a single professional. In 1972, almost three quarters of the offices employed three or fewer assistants. In these offices, little need exists to codify and formalize prosecutorial policy for the assistants. Policy is transmitted through informal, daily communications as the staff work shoulder to shoulder with the prosecutor.

As the size of the office grows, the need for clear enunciation of policy and techniques to see that it is actually being implemented increases. The complex organization that exists to support large offices may result in the policy making function being delegated to someone other than the District Attorney. Policy in these large offices tends to be transmitted through more formal vehicles such as policy manuals (very difficult to create and update), staff memoranda (usually reactive in nature), staff meetings (where the policy is more often transmitted informally through the discussion of individual cases, than raised as an issue in itself) and the on-the-job training (where advice is sought from a more experienced assistant about a particular matter).

Under these circumstances, as policy is dispersed through various organizational units from the policy maker to the policy implementers (the charging assistants), a policy making sub-level may be created within the office unknown to the prosecutor. *With little effective communication from the top, the charging assistants through their daily contact with each other may establish and maintain an entirely different charging policy from that of the prosecutor.* Under these more complex organizational situations, a typical pattern is for the prosecutor to delegate authority to the first assistant, the lawyer responsible for the operations of the entire office. He, in turn, delegates criminal prosecution authority to a chief of the criminal division who, in turn, delegates charging authority to a chief of intake. As the layers of delegation increase and as the opportunities for direct communication with the policy makers decrease, it is clear that the probability of making charging decisions that are consistent with the prosecutorial policy is reduced. Concomitantly, the opportunity for abuse is enhanced.

What large offices need are techniques capable of measuring whether the assistants are charging in a manner consistent with prosecutorial priorities. Unfortunately, the most efficient methods to achieve this are still under development, their progress is discussed in more detail in Chapter V. Nevertheless, alternatives (however limited) exist. A popular method is a review of selected cases by the prosecutor or his first assistant to determine whether the charging decisions made are consistent with decisions the prosecutor himself would have made. This procedure is a modification of the practice followed by smaller offices and adapted through a sampling of cases to the large office. In smaller offices, such as Montgomery County, Maryland (18 assistants), consistency of decisions with policy is monitored for all felony cases and some marginal misdemeanor cases through an on-going review procedure. Every Tuesday and Thursday, the senior assistants review all the cases presented by the staff for charging decisions, and once a week all the cases reviewed are presented by the senior assistants to the States Attorney. This is an effective method to ensure that the charging decisions are consistent with policy. Unfortunately, the volume of work in larger offices precludes use of this procedure for all cases and forces the selection of a sample of cases. Yet even if based on a sample of cases, the most important benefit of this approach is the direct involvement of the top policy makers in determining whether the staff decisions are consistent with their policy. If the sample of cases is representative of the range of decisions being made, this type of review can be very successful and provide a valuable control on the transmittal of policy. There are weaknesses to this approach, however. The major one is that while the review of the cases may identify problem areas (shown by disagreements with the decisions), it does not necessarily correct the procedures or solve the problems associated with transmitting policy.

This weakness may, in part, be corrected by using staff meetings to identify areas of inconsistencies and to provide a vehicle for the transmittal of policy. There are additional benefits that accrue from staff meetings where cases are reviewed for the charging decision. These include the exposure of newer assistants to prosecutorial policy and provide valuable support to increased uniformity in making these decisions. Since staff meetings tend to be held at a lower organizational level, usually conducted by a branch chief or a chief of trials, one should be aware that under these circumstances, there is no assurance that the top level policy is being transmitted to the assistants. Indeed, such meetings may well reinforce the existence and maintenance of a charging policy operating at this sub-level and different from that which the prosecutor thinks is operating.

Until the necessary procedures to correct these weaknesses are developed and refined, it appears that a prosecutor who wants to ensure that his policy is being

transmitted and implemented consistently at the decisionmaking level will have to use a combination of these procedures. To the extent possible, he should review on a regular basis a representative sample of cases for agreement with his policy. After his review, the cases and the results of his review should be discussed at staff meetings, appropriately conducted by policy makers not having a vested interest in the charging decision. A benefit to this combination is that it provides a vehicle for information feedback to the prosecutor thereby keeping the policy dynamic. In addition to these verbal forms of communication and promulgation of policy, the prosecutor should support the transmittal process by written communications. Written materials are not easily updated. Therefore, they should deal with policy matters that can be generalized or broadly stated and are not expected to change over time. The interpretation of exceptions to these written materials should either be in memo form as they occur and have general applicability or be stated verbally.

E. The Uniform Application of Decisions

Although the basic requirement in operating a pretrial screening program is that the charging decisions are made consistent with the prosecutor's priorities, an ancillary requirement is that the decisions be made uniformly by charging assistants. Abrams in his article on Prosecutorial Discretion [3] makes a distinction between "horizontal" and "vertical" consistency. Abrams would consider our definition of consistency as a vertical process and uniformity as a horizontal process. He states:

> "But the greatest problems of maintaining consistency are those that are horizontal in nature—where there are multiple decisionmakers operating in the same system, at the same level, coordinate in authority and responsibility. Such a system combines all of the aforementioned vertical consistency problems with the additional difficulties of ensuring that prosecutors who contemporaneously perform similar functions are performing them in a similar manner. The most serious problem of maintaining consistency thus exists in the larger prosecution offices and systems".

Not only is there the problem of ensuring that the prosecutor's policy is being applied at the charging level, but also that it is being applied uniformly by all assistants. *The first indication that there is a breakdown in the uniform application of policy is the existence of "assistant shopping".* Under these conditions, the police seek out those assistants whose *philosophy* is similar to theirs to review and approve their arrest charge. For example, an assistant who personally is revolted by homosexual behavior would be the likely target for the police officer who has arrested a man for solicitation. An assistant who is known to be "tough" on white collar crime would be sought out by the detectives who have arrested embezzlers. These examples are not meant to deny the value of using assistants who may have special subject matter knowledge (e.g., white collar crimes, sex crimes, narcotics, etc.) that is needed to make a proper charging decision. This is not defined as "assistant shopping."

The evils of assistant shopping as an indicator of the existence of discriminatory practices have been recognized by a number of prosecutors. They have attempted to solve the problems using a variety of procedures, most of them directed at assigning police officers, to charging assistants on a controlled basis, usually first-come, first-serve or by some random assignment basis. While these procedures may control access to a particular assistant, they do nothing to cure the cause of the problem, namely a lack of uniformity in making charging decisions.

Individual differences in attitudes and values will never be eliminated in the offices of the prosecutor, nor should they be. But such variation should be controlled so that improper bias does not enter the system and so that each defendant is assured of having his case examined on at least a set of factors which are uniformly applied to all cases. A common statement by prosecutors is, "I trust my assistants". Whether this "trust" is considered to be sufficient because of the prosecutor's lack of sensitivity to the need for uniformity or whether the collegial environment of lawyers prevents a testing of this assumption are areas meriting further investigation rather than speculation. Yet, the ABA clearly states that the "ultimate goals of prosecution * * * (are) the fair efficient and effective administration of criminal justice." [4] The fairness emanating from uniform charging may well be limited because there are few tools available today capable of monitoring or measuring the degree of uniformity in charging decisions. One fact bears repeating. *The problems associated with policy transfer and uniformity of charging*

[3] Norman Abrams, "Prosecutorial Discretion", UCLA Law Review, Vol. 19 No. 1, p. 6ff.

[4] American Bar Association Project of Standard for Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function.* (approved draft) (New York: American Bar Association, 1971).

are those of the large office with complex organizations. It is in these offices that the tools for monitoring and evaluating cases are most needed and where most of the developmental activity is occurring.

An alert prosecutor in a small office is aware immediately of variances in charging policies among his assistants because they bring it to his attention. For example, if the office policy is not prosecuting possession of marijuana under an ounce and of the three charging assistants, one does not follow this policy, his deviance is called to the attention of the prosecutor by the other two assistants or by defense counsel. The solution is simple, the prosecutor intervenes, the assistant either conforms to the policy or leaves, and uniformity of charging is restored. In the larger offices, adaptations must necessarily occur. The most common procedure used to foster uniformity in charging is through a charge review process. The assistant in charge of the complaint room, or the indictment bureau, or the intake division, whatever its name, reviews the charging decisions of the assistants in his unit and corrects those that appear to be out of line. The weaknesses with this procedure are that it does not ensure that the reviewing assistant is attuned to the policy of the office; it transfers knowledge on an exception basis, focusing on those areas where mistakes are being made; and it does not produce a correcting procedure to increase uniformity.

Another technique, and one probably more suitable for developing criteria for uniformity, is the staff meeting. If these meetings can be structured to focus on the need for uniformity and base the discussion of specifically selected cases on charging decisions, a situation is created that not only will assist in developing uniform decision practices but also will provide feedback to keep the system dynamic and responsive to changes. Yet even with these two responses to the problems of uniformity, there is a need for a system whereby the extent of uniformity can be measured and the amount of variation allowable monitored. These emerging techniques will be discussed in the next chapter. For the present, the prosecutor must rely on the development of a strong review and control process enmeshed in an atmosphere of communication and critiqued through staff meetings.

F. Impact of Decision on Dispositions

The last requirement generated by implementing pretrial screening programs is that the impact of the charging decisions be evaluated in terms of final dispositions. Historically, the charging decisions have been evaluated in terms of the choices selected by the assistant. What is the rejection rate? How many cases were referred to another court? How many were accepted? How many placed in diversion programs? How many felonies were reduced to misdemeanors? While these are interesting figures describing some characteristics of the total caseload presented to the office they do little to measure the effectiveness or impact of the charging decisions. *Every charging decision is made in terms of an expected or desired outcome. By selecting a desired outcome, the policy of the office is translated into a decision.* For example, if the policy is to rehabilitate the defendant, charging decisions will be based first on the simple choice between diversion or prosecution. To charge in contradiction to the office policy will not escape notice for long. If the reviewing assistant does not catch it, the trial assistants who operate under the same policy will complain about "poor screening."

The charging decision becomes the first step in a course of action that leads to an expected outcome. Therefore to measure the impact of screening one must first know what is expected (namely, the policy of the office) and second, what actually occurred in terms of a final disposition. We have seen from the decision flow chart that dispositions occur throughout the prosecutive process. We have also seen that in terms of policy, it is often as important to know where a disposition occurred as well as why. Many reporting systems have collected "time-in-process" information in addition to dispositions. We note that though the time-in-process is highly correlated with the process step at which the disposition occurred, it does not provide the location information needed for management purposes. Knowing the pattern of dispositions by location allows the prosecutor to allocate his staff and resources in a more meaningful manner. If most of the cases are being diverted or disposed of prior to preliminary hearings, resources should be allocated to the front end of the system to support this activity. This is in line with Garber's complaint that too often all cases are processed as though they were going to trial.

The appropriate measure of the effectiveness of a pretrial screening program is not the rejection rate but the overall disposition pattern for all cases, including rejects, identified by location, time and reason. Case dispositions provide an important data base for the prosecutor. They tell him what is actually occurring in his office and let him compare these outcomes to what he would have preferred as outcomes. Any evaluation of the effect of pretrial screening requires the complete and comprehensive collection of data at

the decision points throughout the prosecutorial process. These data should be refined to the point where they explain what is taking place and why. The decision flow chart provides the base for the development of the data collection system since it identifies the points of interest and possible outcomes at each point.

Data collection and reporting at these points need not require large expenditures of manpower or resources. A single reporting from identifying the basic characteristics of the case and containing information regarding the final disposition of the case, the location in the process and the reason for the disposition will suffice.

Figure 9 is an example of such a form that can be placed inside the case jacket until disposition and then forwarded to the person who is aggregating the statistics for the office. The necessary requirements for installing and maintaining a successful reporting system are relatively simple. They are that the reporting system:

- has operational and management utility;
- be on-going and continuous over time;
- be capable of operating independent of change in organizational structure i.e., be process-oriented, and
- be designed for manual processing but adaptable for automation.[5]

Too often reporting systems have failed because they impose an added work-load on the office personnel without any apparent operational benefit. This reporting system provides a prosecutor with information to meet his needs, not the needs of the courts or police. The data collected can be used not only for monitoring the impact of his policy on dispositions but provides a tool for budget justification as well as planning. For prosecutors with existing reporting systems, the information required for this purpose should merely create a refinement of some reported data elements.

Finally, one must respect the importance of change in measuring the effect of screening on final or expected final dispositions. Change may take one of two forms: structural or policy. Structural change results from a change in organization or procedure. The establishment of a pretrial screening unit is structural change. The move to a trial team procedure is structural change. Structural change is usually planned well in advance of its occurrence so that the "before" data can be collected and identified from the "after" data. In this way the effect of change can be measured on a before/after basis.

A more subtle problem, and one far more difficult to control or measure is that of policy change. For example, the effect of a defendant rehabilitation policy cannot be evaluated if the charging decisions move to a system efficiency policy. It may be that even with the most extensive safeguards, some policy change will occur unbeknownst to the prosecutor or his staff. Nevertheless, it is critical that safeguards be instituted. These can be established in three different areas. The most important area is the prosecutor himself. Since he alone holds the key to policy changes, ideally none should occur without his knowledge or authorization. In practice, other circumstances may very well intervene. Therefore, more bureaucratic safeguards, in the form of reporting systems, must be installed to monitor these changes. In addition to monthly memoranda or policy changes discussed at staff meetings, exception reporting systems could be created which would monitor the statistics for unexplained variations in dispositions. (The potential for these are discussed in the next chapter).

There is a serious caveat, however, in measuring the impact of screening decisions on final dispositions. To the extent that these initial screening decisions can be changed later in the process, the ability to measure impact on final dispositions is reduced. In many offices, the charging decision of the intake and review section is often changed or modified by trial assistants, thereby reducing the ability to track directly from the initial decision to the final disposition. In these instances, the decisions of the trial assistants assume a value equal to that of intake and review. This is not to say that changes in charges are to be prohibited. Indeed, it is common, accepted, and necessary that cases be reviewed at the trial stage because of the potential for evidentiary change over time. The problem for evaluation occurs when the trial decisions to dismiss or modify the charges are made independent of bureaucratic controls. Changes should be reviewed and approved by a supervisor who can be held accountable for maintaining office policy. If a prosecutor lets his assistants make decisions autonomously, without review, then he has no way of knowing whether the expected dispositions at charging have been reversed or changed at the trial stage. When this occurs the effectiveness of the pretrial screening program as measured by disposition is difficult to determine. It would be impossible,

[5] For a detailed description of reporting systems and records systems designed for prosecutors (including forms and operational procedures) see the series of manuals (developed by the National Center for Prosecution Management and available from the National District Attorneys Association) on screening, managing case files, and statistics.

Figure 9
Model Form For Evaluation Of An Individual Local Pre-Trial Screening Project

COPY 1 - mail to evaluator as soon as possible. COPY 2-3 - your files.
COPY 4 - if case accepted, send to evaluator upon final disposiiton.

Pre-Trial Screening Evaluation

(Office Name) _____

(Address) _____

_____ (phone) _____

Evaluation Received Date _____

Coder _____

Verifier _____

000-00-000
(Serial Number preprinted)

Name of Defendant | Sex | Race | DOB

Address:

Date Offense | Date Arrest

Complaint Number

Defendant I.D. No.

Court Case Number

Prosecutor Action: | Accepted | Refused | Other

Coding only

Reason (if not accepted)

Police Arrest Charge(s)

Prosecutors Charge(s)

Coding only

Charging Assistant Name: _____ Date: _____

A. NATURE OF CASE

	check if applicable	pts.
Victim		
one or more persons	☐	2.0
Victim Injury		
received minor injury	☐	2.4
treated and released	☐	3.0
hospitalized	☐	4.2
Intimidation		
one or more persons	☐	1.3
Weapon		
defendant armed	☐	7.4
defendant fired shot or carried gun, or carried explosives	☐	15.7
Stolen Property		
any value	☐	7.5
Prior Relationship		
victim and defendant—same family	☐	-2.8
Arrest		
at scene	☐	4.6
within 24 hours	☐	2.9
Evidence		
admission or statement	☐	1.4
additional witnesses	☐	3.1
Identification		
line-up	☐	3.3

B. NATURE OF DEFENDANT

Felony Convictions		
one	☐	9.7
more than one	☐	18.7
Misdemeanor Convictions		
one	☐	3.6
more than one	☐	8.3
Prior Arrests—Same Charge		
one	☐	4.5
more than	☐	7.2
Prior Arrests		
one	☐	2.2
more than one	☐	4.2
Prior Arrest—Weapons Top Charge		
more than one	☐	6.4
Status When Arrested		
state parole	☐	7.1
wanted	☐	4.2

DISTRICT ATTORNEY'S EVALUATION _____

TOTAL SCORE _____

RANKING CLERK _____

FOR EACH CHARGE; RECORD: (1) Disposition, (2) Reason, (3) Process Step, (4) Date _____

for example, to know whether a trial assistant is dismissing cases because the screening section is not charging properly, because the trial assistant is negligent in case preparation, or because changes in evidentiary strength over time force a modification to the original charge. *To evaluate the effect of pretrial screening decisions and to maximize uniformity in prosecution, the pretrial screening function must be well integrated into a processing system that establishes accountability for the decisions.* This means that the initial charging decisions should be reviewed and approved, that any subsequent changes be justified and that the final disposition be expected.

G. Summary

This chapter has focused on the requirements generated by a pretrial screening program for uniformity, consistency and the evaluation of the program in terms of final dispositions. It has noted that when the prosecutor moves from a position of no screening to the establishment of a pretrial screening program, the move is and should be justified in terms of the economic benefits to the criminal justice system. The act of reviewing cases and approving charges yields great savings in time and money. This is particularly true where it reduces the number of unnecessary court hearings and trials.

Once the prosecutor has instituted screening, it is necessary for him to consider screening as a process and not as a unit attached to his office. Only by viewing charging decisions as the most important decisions to be made in his office can the full importance of the need for uniformity and consistency be seen. If one looks at the charging decision as the first step in a series of decisions that will be made about a case, then it is necessary to describe and understand the decision process so that controls and supervision can be placed about those decision points that are critical. Review and approval control procedures should be established when any other decision than the charging one might change the expected final disposition. The decision flow chart presented in this chapter visually defines the conceptual framework that a prosecutor will find useful in evaluating his own screening and prosecution process. It states that decisions are based upon information available to the decisionmakers who may select actions from a group of actions. It also states that these conditions vary over time and over the prosecution process. Hence, to evaluate the validity of any decision one must know the participants, the data available, and the choices of action available. The decision flow chart also can be used as a tool for the development of policy guidelines and standards as well as a management reporting system. Each decision point can be examined for the policy applicable at that point and the control needed to ensure consistency. Writing policy guidelines specifically addressed to the points will help in establishing relevance to a policy manual. It is obvious that a prosecutor needs to know not only what the disposition of a case is, but why and at what stage in the process the disposition occurred. The decision flow chart provides a base for identifying where data should be collected.

When thought of as a decisionmaking process operating under policy, the need is obvious for uniformity and consistency in the charging decisions, as well as in other subsequent decisions. We have seen that the tools for reaching these goals are generally inadequate. Consistency with policy suffers from the effects of organizational size. As the office increases in size, the problems of transmitting policy and monitoring its application increase proportionately. Without quantitative tools and procedures, the prosecutor is left to rely on a review of selected cases to see if the charging decisions are consistent with his policy, staff meetings to discuss the cases and the policy implications, and the development of policy manuals for general policy supported by memoranda for interpretations and exceptions to the rule.

The problems associated with uniformity of charging among assistants are perhaps even more difficult to evaluate and modify without quantitative tools. We know that "assistant shopping" is a good indicator of a breakdown in uniformity. At the most, in addition to frequent staff meetings, the prosecutor has little recourse to other solutions except to provide accountability through supervisory review and approval at those decision points where the expected final disposition can be changed.

Following this investigation, it appears the underlying reason why many prosecutors have not viewed pretrial screening as the start of a decisionmaking process in their office, and have not placed the highest priority of consistency and uniformity, is not due to indifference but to a lack of tools and procedures to help them. It is encouraging that recent research and developments have started to address this problem. But with so little knowledge existing in proportion to the need for new knowledge, a great deal of work is still to be accomplished. The next chapter will examine the current tools as they exist today and indicate areas needing further knowledge, knowledge most easily supplied by the informed prosecutor as he thinks about his own office.

CHAPTER V. THE NEED FOR MORE KNOWLEDGE

A. Introduction

The results of our study have identified the critical question: Is there such a thing as policy guiding a prosecutor's office and how does one ascertain this? Many prosecutors do not consciously deliberate about adopting a policy, or even systematically articulate one. It is not unusual to find that some prosecutors are unable to describe their policy, even in the most general terms. Instead they explain that policy differs according to the circumstances of the case so that each case must be examined individually. From one perspective, this is true. Variations in seriousness of the offense, the record of the defendant or the evidentiary strength of each case clearly require prosecutorial decisions on an individual basis. Our interest, however, is not with regard to an individual case. We are focusing on the pattern of all decisions as they take shape within a given prosecutorial environment. The fact that the prosecutor's decision-making function takes on different patterns in different offices and that the patterns are logically predictable once the goals of the office are known shows that policy is in operation.

Decisions are not made randomly; they are made with reference to a set of preferences and are expressed through the act of choosing a course of action. Thus, how the available choices are selected or used reflects the policy of the office or the individual decision-maker. A discernible pattern of decisions may be obscured in those offices where each assistant makes decisions with reference to his own policy preference. The patterns presented in the earlier figures showing how policy affects dispositions may well be disturbed if for example, one assistant charges on the basis of a quick plea bargain, another looks at the case in terms of diversion potential for the defendant, and another is so personally revolted by the crime that he wants a conviction at the highest level. When this occurs, the patterns described in Chapters 2 and 3 will barely be discernible.

We have seen that the policies discussed in this report can be most easily identified by knowing what the preferred dispositions are. The most stable indicator of preference is the "preferred disposition" of a case. Every assistant who reviews a case examines it in terms of a preferred disposition. In the reality of a working office, not all cases are expected to go to trial, and all are not expected to be disposed of favorably. In line with policy and priority, a preferred disposition is expressed. *The preference expressed with regard to disposition thus becomes a rudimentary statement of policy. As a result, the identification of policy operating in a prosecutor's office, or the verification of a stated policy can be facilitated by examining the disposition of cases relative to the preferred dispositions.*

This report has described the effect of policy on the prosecution process, showing how the initial decisions set the tone and character of the rest of the prosecution. We have seen that the first, and sometimes most important step in implementing policy occurs at the charging level. At this and subsequent levels, we have also seen that major problems in policy implementation affecting large offices occur in:

- transmitting the prosecutor's policy to the assistants who become the decisionmakers;
- ensuring the uniform application of policy among decisionmakers;
- refining strategies and resource allocation plans to best support the implementation of policy, and
- evaluating the impact of policy in terms of whether it is doing what it was expected to do.

The problems discussed in previous chapters and summarized here point to the need for additional knowledge about prosecutorial discretion and decision-making. The demonstrated effect of policy on disposition patterns requires further effort in identifying the policies in use today and verifying their disposition patterns. This effort can be made more economically and efficiently with tools and procedures that produce quantifiable and/or objective measures of prosecutorial policy. A brief discussion of these needs is presented here to acquaint the reader with an awareness of the scope of work still to be performed. Finally, in light of the knowledge presented here a brief statement of some of the new implications concerning pretrial screening is attached. These reinforce other exist-

ing statements about the value of screening and our need for more knowledge.

B. Identification of Existing Policies

Based on our past experience we have seen that currently the operating policy in a prosecutor's office can best be identified through an on-site visit. These visits, conducted by persons not connected with the office, produce a fairly clear identification of the policy that sets the tone and tenor of prosecution in that particular office. The policy is identified from talks with the prosecutor, those to whom he delegates authority as well as other members of the criminal justice system. There are weaknesses in using on-site visits as the means of identifying policy, obviously.

- It is very expensive (in time and money) to identify policy by on-site visits.
- The conclusions of the persons conducting the visits cannot be easily verified for accuracy.
- It is difficult to identify the extent to which more than one policy operates in an office and their relative effects on case dispositions.
- The results are qualitative. Consequently, they do not provide a quantifiable base for further research or analysis or produce objective data for aggregation to a larger group.

Aside from the methodological weaknesses of on-site visits, a basic gap in our knowledge and skills is pointed to. There is presently no way to assure that all of the currently operating policies have been identified. For example, we can postulate a policy called "community protection" although we have not observed it in operation. Yet this policy may exist if there is a prosecutor who feels that his primary responsibility is to protect the community. The result of prosecutorial decisions to meet this goal may well produce a disposition pattern different from the ones we have previously described. Additional policies, if they exist, need to be identified. Presently their identification is made from personal knowledge. Either the prosecutor reading this prescriptive package says, "Oh, I understand but I have a different policy", and notifies the researchers. Or the researchers, in the course of their travels hear about different offices that may be worthy of investigation. We need to develop an easier more systematic way to identify all the operating policies existing today.

Our examination so far has pointed to the patterns of case dispositions as being the most likely approach in differentiating policies. Once the identity of a policy is established, its impact must be measured and evaluated. This is most simply done by an analysis of the dispositions in an office if the office is pursuing a single policy. If the office is utilizing a mixed set of policies, we have no assurance that case disposition pattern analysis will suffice. For example, the defendant rehabilitation policy may be precisely followed in processing a clearly defined set of first offenders while the rest of the cases are disposed of in terms of system efficiency. The disposition patterns generated by these two simultaneously operating policies may very well wash each other out. Not only must we know what policies tend to be mixed when they coexist but also we must determine the extent of mixing that occurs. How many prosecutors' offices operate under more than one policy? Does the mix pattern tend to remain constant from one office to another? In other words, do prosecutors tend to act alike in their use of policies? Are their standards fairly similar, for example, as they apply to the first offender and the recidivist? This entire area of the use of mixed policies is of great importance if one is attempting to analyze the role of prosecution and the variations arising from the use of discretionary power. Clearly, it sets the foundation for the development of models and procedures to measure and perhaps monitor this process.

C. Tools and Procedures to Quantify Prosecutorial Policy

The primary task is to develop quantitative tools and techniques capable of identifying the existence of policy, the degree and extent of policy mix and the impact of charging decisions on prosecution, on the criminal justice system and even to a degree, on the community. Without such tools the degree of consistency and uniformity in charging and other decisions will be difficult to measure or monitor. The decision flow charts and monitoring techniques are simply not sufficient for measuring degrees of uniformity and consistency. To develop such tools will provide unlimited economies to further research efforts as well as benefits to developing and supporting programs designed to strengthen and improve the prosecutive function in America today.

We believe that prosecutorial policy can be expressed in terms that are objective, quantifiable and capable of statistical analysis. This is possible because policy can be translated into a set of preferences expressed as "preferred dispositions." This translation occurs every time a prosecutor or an assistant makes such typical remarks as, "This one is garbage, let's get rid of it," "Let's let this one plead to a reduced charge," "I'll go for a dismissal here if he'll testify for us in this other

case," or "Let's go all the way. This guy is so bad and this crime so heinous he should never get out again." The fact that the preferences are expressed colloquially, in no way diminishes their value as a translator of policy. They focus on preferred dispositions that are consistent with either the prosecutor's policy, the office policy or the individual's own policy.

If one can develop measures of prosecutorial priorities expressed in terms of outcomes, then one has the statistical capability to examine the application of policy and its impact in an office. The two procedures needed to conduct this examination are the statistical replication of prosecutorial priorities and a scaling of preferred dispositions. A great deal of work has been done in replicating prosecution priorities. Many prosecutors have the foundation of such a system as part of the PROMIS system. However, these systems cannot be installed without professional assistance in statistics, management information systems and computer specialists, if automation is to be considered. What is needed is the development of a simpler package that would allow a prosecutor to develop scales reflecting his priorities with minimal outside assistance. Scales reflecting preferred dispositions are entirely new in prosecution research. No attempt to develop them has yet been tested although in theory and logic they seem feasible. The following sections explore these two areas in more detail, presenting the background, the current status and the requirements for further work. Clearly these are areas of critical importance to the prosecutor and even though they are generally still in prototype form, the prosecutor should be aware of their existence and what they are attempting to do. Their success to date is a result of prosecutor interest and input. Their improvement is based on these same two factors.

1. *Replicating prosecutorial priority in case evaluation systems.* The most sophisticated techniques for replicating prosecutorial priorities have been developed for case evaluation systems. Since 1968, LEAA has supported research and development of case evaluation techniques to weight cases in terms of

- the gravity of the offense;
- the seriousness of the defendant's criminal history, and
- the evidentiary strength of the case.

These weights serve to translate the prosecutor's policies and priorities into clear and specific guidelines for use by all office personnel. The numerical scores derived from case evaluation indicate how the prosecutor himself would order each case in terms of its importance for prosecution if he could review each one personally. Using these scores, any staff member processing a case—an assistant, an investigator, or a clerk—can make a decision knowing the prosecutor's policy.

Case evaluation systems were originally developed by the District of Columbia Government's Office of Crime Analysis [1] for the U.S. Attorney's office in 1969. They are incorporated in the computerized system known as PROMIS [2] which is presently being implemented in approximately 22 prosecutors' offices throughout the country. Since the development of PROMIS, the evaluation systems have been modified and refined. The most current version exists in the Bronx District Attorney's Office supporting the Major Offense Bureau activity.[3]

Case evaluation systems are based on adaptations of the scaling techniques developed by Sellin and Wolfgang [4] and by Don Gottfredson.[5] The Sellin and Wolfgang scales measure the seriousness of the offense primarily in terms of the amount of personal injury or property loss sustained. Gottfredson's Base Expectation scales are directed to predicting recidivism from California correctional institutions. These scales have been modified to measure the seriousness of the defendant's prior criminal behavior. They weight the amount, character and density of previous arrests and the mobility of the defendant. Additionally, new scales were most recently derived for the Bronx District Attorney to gauge the evidentiary strength of the case.[6]

Figure 9 in Chapter IV shows the form used by the District Attorney's office in the Bronx to rate the cases coming into the system according to his policy. The items with numbers are those factors that are statistically significant for this prosecutor's policy; the numbers themselves are the weights derived from a multi-

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[1] *Final Report: Project TRACE,* Joan Jacoby, Director (1972: Washington, D.C., Office of Crime Analysis, Government of the District of Columbia).

[2] System Overview and Report Format for PROMIS (*Prosecutor's Management Information System): A Computer Based System for the District of Columbia,* Joan Jacoby, Director (1971: Washington, D.C., Office of Crime Analysis, Government of the District of Columbia).

[3] Mario Merola, "The Major Offense Bureau: A Blueprint for Effective Prosecution of Career Criminals," *The Prosecutor,* 11: 1, July, 1975.

[4] Thorsten Sellin and Marvin Wolfgang. *The Measurement of Delinquency* (1964: New York, John Wiley and Son).

[5] D. M. Gottfredson and K. Ballard, Jr., "Differences in Parole Decisions Associated with Decision Makers", *Journal of Research in Crime and Delinquency,* July, 1966.

[6] Joan E. Jacoby, "Case Evaluation: Quantifying Prosecutorial Policy," *Judicature,* 58: 10, May, 1975.

ple regression analysis.[7] The form was designed so that a clerk could complete it based on information supplied by the police, and sum the weights to determine the case score. All cases with scores higher than a predetermined cut-off point are referred to the Major Offense Bureau for review.

The advantage of these types of case evaluation systems lies in their inherent objectivity. Since each case presented for prosecution review is scored on the basis of the *same* factors, the evaluation is uniform and consistent. Objectivity is also achieved because the factors used for the evaluation are statistically derived (quantifiable) and require only minimal subjective interpretation.

Since the priority ranking is a reflection of policy and can be applied to the case at intake, it not only measures the seriousness of the case for prosecution but it permits the analysis of uniformity of charging. In addition, it offers a means of comparing the expected outcome of the case with the actual outcome relative to the policy of the prosecutor. For example, one would expect that a case scoring high on the urgency scale should result in a disposition favorable to the prosecutor (conviction) and even receive a longer sentence or harsher punishment than a case scoring low on the scale. Where deviations occur in the actual outcome as compared to the expected, this technique provides a means of identifying such results. However, it does not pinpoint the reasons for the discrepancies in outcomes. This responsibility rests with either the policy managers of the office or the evaluators of the program.

As stated before, the development of scales to reflect the priorities of cases for prosecution must be undertaken with professional assistance. The scales should be derived from a statistical analysis of the data. Where prosecutors have attempted to put their own numbering system on as weights, the results have been almost worthless. For example, the weights intuitively assigned by the assistants in the Bronx District Attorneys Office predicted the policy and priority 5% of the time. After statistical analysis of the data, the weights derived from a multiple regression analysis predicted the priority more than 60% of the time.[8]

2. *Preferred disposition scales.* To truly evaluate the charging function as a reflection of policy and its impact on the criminal justice system, dispositions should be weighted relative to urgency for prosecution and assessed relative to preferred outcomes. This means that if a high priority case results in a conviction, the prosecutor knows he has performed well. But if a high priority case is dismissed for insufficient evidence, then the prosecutor is alerted to a potential problem. Looking at all dispositions over a period of time, the prosecutor can see what is happening to the cases as they are ranked by urgency for prosecution. Are all the low priority cases being disposed of by pleas? What is happening to the high priority cases? Are their conviction rates better than the ones with lesser priority? If resources are scarce, where should they be placed to support the successful disposition of high priority cases? These are some of the questions that can be answered, in part, by the development of preferred disposition scales but which justify further work in this area.

By coupling a case evaluation system with actual dispositions, a technique is provided to evaluate the success of a policy and its implementation. A simplified example of how this can be done is shown in Figure 10.

FIGURE 10.—*Example of cases weighted by urgency and disposition*

Case No.	Prosecutor priority ranking (low=1)	Disposition: Most preferred = +1, Least preferred = −1	Weighted	Maximum weighted disposition possible
1	4	−1	−4	4
2	7	+1	7	7
3	2	−1	−2	2
4	5	+1	5	5
5	12	+1	12	12
6	11	+1	11	11
7	9	+1	9	9
8	8	−1	−8	8
9	1	+1	1	1
10	3	+1	+3	3
11	10	+1	10	10
12	6	+1	6	6
Total...		+9	+64	78
		−3	−14	

Rates	Weighted dispositions	Unweighted dispositions
Most preferred rate.....	64/78=82.1%	9/12=75.0%
Least preferred rate.....	−14/78=17.9%	3/12=25.0%

[7] *Report to the Bronx District Attorney on the Case Evaluation System*, Joan E. Jacoby, Director, (1974: Washington, D.C., National Center for Prosecution Management).

[8] Jacoby, "Case Evaluation: Quantifying prosecutorial policy" *op. cit.* p. 491.

This figure shows how twelve cases would be weighted using a case evaluation system that reflects prosecutors' priorities for prosecution. They are ranked in order from a low priority of 1 to a high of 12. The outcome of each case has been examined by the prosecutor and assessed as either a "most preferred" disposition (+1) or a least preferred disposition (−1).[9] Multiplying the priority rank by the assessment of the outcome produces a weighted disposition score. When compared to the maximum range of dispositions a relative achievement score can be obtained. In this case a positive score of 64 was divided by the maximum score possible (all successes) to achieve a relative success rate of 64/78 or 82.1%.

If the traditional (unweighted) method of obtaining a conviction rate is used, the success rate would be 9 out of the 12 cases or 75%. The weakness of the unweighted system is that it does not show dispositions in terms of priority. Hence it leaves an evaluator unable to state whether dispositions are occurring in line with the priorities of the office. By weighting dispositions in terms of their priority for prosecution a new dimension is added to the evaluation of the impact of the charging decision on the criminal justice system and a feedback mechanism is introduced to evaluate policy in terms of outcome.

D. New Implications for Pretrial Screening

As the discretionary power of the prosecutor begins to come under more intense examination, it becomes more obvious that it cannot be examined without reference to the rest of the criminal justice system and movements occurring there. Pretrial screening takes on new meaning and importance as it represents the initial exercise of this discretionary power. This section describes some of the implications for pretrial screening that should be considered in any future work in this area. The prosecutor who is starting a screening program or who wants to evaluate an on-going program should be aware of six implications.

1. Improved methods in the delivery of legal services to the defendant through increased funding of public defender agencies, the impact of Argersinger,[10] and increased system efficiency causes a mutual escalation of workload on the part of the prosecutor as well as the court. The response to this escalation, in part, may be to increase staff at additional public expense. Or, more probably, it will force the prosecutor to become more selective in accepting cases for prosecution. As such, the demands for effective and efficient pretrial screening units should increase.

2. As states examine the possibility of abolishing plea bargaining, as has occurred in Alaska, or as individual prosecutors' offices move to this stance, success can only be fostered if court capacity is increased to meet trial needs and screening for proper charging is considered one of the most important decisions to be made in the prosecutor's office. Processing cases on a "no-plea-bargaining" basis asserts the prosecutor's intent to carry forward only cases with a high probability of conviction.

3. As increased pressure is placed on the use of screening programs to reduce workload and implement prosecutorial policy, other benefits accrue. When more intensive scrutiny occurs, the probability of prosecuting the innocent defendant diminishes. The public should fear not the tough prosecutor but the sloppy one.

4. It is important that the impact of policy be measured in terms of impact on other criminal justice agencies. Because the charging decision is a gate-keeper activity, filing or failing to file a charge in a particular case or type of case is a signal to other elements of the criminal justice system of the prosecutor's basic orientations. To the law enforcement agencies are transmitted the priorities for prosecution, thereby influencing their arrest practices and the type of cases brought into the prosecutor's office. Depending on the prosecutor's orientations, the need for pretrial diversion programs and noncriminal treatment programs can be anticipated. In conjunction with the judiciary the impact of the prosecutorial policy can shed a great deal of light on the future characteristics of the incarcerated populations. Corrections will be able to anticipate whether their facilities and programs are to be directed to short-term, high turnover populations or focused on meeting the needs of the long-term inmate.

5. For the first time, a foundation can be laid which will examine the effect of prosecutorial policy on not just the criminal justice system but the community as well. The development of case evaluation systems that quantify prosecutorial priorities and the refinement of disposition reporting information has, for the first time, produced a potential means for measuring the impact of policy in terms of outcomes. Through the use of available statistical tools, we may effectively measure the usefulness of certain approaches by prosecution to

[9] In reality, the preferred disposition would not be evaluated as a dichotomy. Rather the relative preferred disposition would vary along a continuum. We used the +1, −1 evaluation split merely to illustrate the principle of weighting.

[10] *Argersinger* v. *Hamlin*. 407 US 25 (1972).

dealing with criminal behavior and their impact on the local crime problem.

Implementing a pretrial screening program that not only accepts and rejects cases, but also diverts certain types of offenders to other treatment programs and evaluates cases in terms of desired outcomes, indicates that the prosecutor sees himself not only as a lawyer whose responsibility is to allow the ultimate disposition of a case to take place in the courts, but as a policy maker who believes he is capable of providing services to the community to meet its problems. The effectiveness of such approaches to charging and prosecution can now be judged. In turn, the policy they represent can be tested for effectiveness and its impact determined.

6. On a higher conceptual level, a base line can now be established which permits a broader examination of discretion, its limits, scope and impact. The basic issue of prosecutorial discretion, particularly as it relates to screening and plea bargaining, can be examined with an eye to the ever present potential for abuse. This examination can have far ranging implications on our justice system.

E. Summary

While it is apparent that systematic knowledge of the operation of prosecutors' offices is empirically just a few steps removed from infancy, results of our observations from on-site visits provide the basis for future work and identify the need for more knowledge. Prosecutors need tools and techniques to determine whether the actual case dispositions in their offices are occurring in the pattern desired; and whether the most serious cases are receiving the most preferable dispositions; i.e., the highest conviction rates and the most severe sentencing. The charging typology needs refinement and validation to establish the systemic consequences of differences in policy. This would be of considerable value for planning and resource allocation not only on the local but also at the state level.

Two procedures are required in examining policy, charging and outcome: (1) a case evaluation system based on a standard set of cases to be used for comparative studies and typology verification. These will be evaluated separately by the prosecutor and each of his charging assistants to measure consistency and uniformity; and (2) a preferred disposition scaling system using a case control sheet showing ranking, the routing and facts of actual cases, their ultimate disposition, and the reason for dispositions when necessary. In its present form, the charging typology presented here is an intuitive abstraction from observations made during on-site visits. While we have been able to fit each office visited into one of the policy models, this merely establishes the presumptive validity of the typology. Additional empirical data is needed to test for other policy models and to locate dispositional patterns that are at this time not known to us. Patterned deviations from expected and desired dispositions will provide the data for refinement of the charging typology and for extending our understanding of the dynamics of this aspect of the criminal justice system. Refinement and validation of the typology is believed to be of considerable practical value insofar as we have been able to note reciprocal effects between the exercise of the prosecutor's office and other elements of the criminal justice system. In particular, the divergent outcomes apparent under each of the four charging policies discussed in the present typology have quite different implications not only for the judicial system but also for the allocation of fiscal resources and personnel.

The National Advisory Commission on Criminal Justice Standards and Goals rightfully concluded in its report on the courts that the first two priorities in terms of their importance in reducing criminal activity "* * * should be given to speed and efficiency in achieving final determination of guilt or innocence of a defendant. * * *" and "* * * should be accorded to upgrading performance of the prosecution and defense functions." [11] The conclusion to this chapter is that we have only begun to gain knowledge about the role and function of prosecution in our society and that the priorities expressed above can only be achieved with more emphasis in these areas. The need for more knowledge requires the cooperative effort of all participants in this quest, the prosecutor who can best articulate his reasons for action and the researcher, analyst planner or evaluator who can interpret this information to meet the needs of specific program requirements.

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[11] National Advisory Commission on Criminal Justice Standards and Goals: *Courts*, 1973, Washington, D.C. pp. 7–8.

CHAPTER VI. SUMMARY OF RECOMMENDATIONS

Pretrial screening is the first step in a decisionmaking process, functioning over a specific period of time and affecting all other prosecutorial functions and all other elements of the criminal justice system. The decision to charge and the management and operational programs supporting this decision should not be examined solely in terms of reaching a specific decision—to charge or not. The fundamental error implicit in this approach is that it assumes the autonomy of a decision. Decisions cannot be separated from the office's review procedure, the information provided by law enforcement agencies, the charging policy, and the role the prosecutor may adopt. An example of the rippling effect of these decisions can be seen when the prosecutor decides not to prosecute but rather divert defendants involved in victimless crimes. The impact of this decision will be felt at all levels of the criminal justice system, from the police, to the courts, to the community.

There is a lack of ready criteria for the assessment of pretrial screening intake and review. This is because those who have studied the pretrial screening process have failed to see it as an integral part of either the prosecutorial process or the criminal justice system. The failure to see pretrial screening as the first step in the prosecution process with the decisions made at this point reflecting an anticipated disposition results in separating screening from the larger system of which it is a part. The decisions made at intake should be evaluated by how well they conform to the prosecutor's overall policy and goals and how well the management and operating procedures are developed to assist in carrying out the prosecutor's policy.

Three major factors affect the establishment and operation of a pretrial screening program. They are the state constitutional and legislative environment, the prosecutor's perception of his charging responsibility and his prosecution policy. Under ideal circumstances, the state constitutional and legislative environment and case law provide the prosecutor with an opportunity to review cases prior to charging. Additionally, the local criminal justice system is structured and operated in a manner that satisfies his priorities. In less than ideal circumstances, where the court system is fragmented; police reports are not timely, accurate or complete; where charging decisions cannot be controlled; the prosecutor has to adapt and modify his operations so that, at least, his priority requirements are handled.

Despite the external environment, the major forces that shape the existence and character of pretrial screening are directly attributable to the prosecutor himself. How he views his charging responsibility determines whether he, first, needs a screening program and, if so, how complex it must be. If he assumes the responsibility for charging, he has, in fact, also assumed the responsibility for ensuring that the decisions are made uniformly, anticipating dispositions consistent with policy. The direct relationship between the charging decisions and the expected outcomes has two results. As the policy of the prosecutor differs, different patterns of case dispositions should be produced, directly affecting the courts, corrections and the community. Since case disposition patterns vary because of policy, a prosecutor's performance should not be judged by one measure alone (e.g., a dismissal rate, or rejection rate or by simple comparison to other prosecutors' offices). The prosecutor should be evaluated in terms of what he hopes to achieve (his policy) and how closely case dispositions approximate the goals of that policy.

Each policy has a different set of preferred outcomes: the legal sufficiency, to accept a case if the elements are present and then dispose of it quickly to reduce workload; the system efficiency, to speed up the system by reducing court backlog through screening, diversion, and fast and early dispositions; the defendant rehabilitation, to minimize the defendants processed through the criminal justice system; and the trial sufficiency, to seek conviction if the case is accepted. Once a policy has been selected, it should be made internally consistent by using the appropriate prosecution strategies and assigning work in a rational and consistent fashion. Because disposition patterns vary by policy, the most important finding is that the prosecutor cannot be evaluated on the basis of case dispositions unless we know what he is attempting to do.

Knowing what he is attempting to do, then leads to the ability to see how well he is doing it. We have seen that even though policies vary, and so the dispositions, once a policy has been selected it should be internally consistent. This means that not only could one predict expected outcomes for cases but also that one could identify the strategies that are most supportive of the chosen goal. The strategies that vary by policy are plea negotiation, implementation of discovery and diversion. Discovery is a strategy consistent with the goals of efficiency, rehabilitation and trials since it provides knowledge to the decisionmakers. Plea negotiation provides a necessary outlet for the saturated court system created by a legal sufficiency policy or a swift disposal route for the efficient processing of cases. Diversion is a strategy suitable to all policies although the reason for using it will vary by policy. The employment of a particular strategy by a prosecutor should be consistent with his goals and priorities or it may result in unnecessary work or even worse, in procedures that would be counterproductive.

Just as the strategies should be consistent with policy, so too should the allocation of prosecutorial resources. How the prosecutor distributes work among personnel must be consistent with what he hopes to achieve. The three major areas of interest here are the personnel requirements for charging, case preparation for trial, and sentence recommendation.

If in fact, as we have suggested, policy plays such a critical role in the prosecutive system, affecting the outcome of cases and suggesting the use of some strategies and personnel instead of others, then it seems that one of the major tasks facing a prosecutor is to ensure that his policy is uniformly and consistently applied by the assistants. Because evidence most likely will change over time, the problem of evaluation occurs when the trial decisions to dismiss or modify the charges are made independent of bureaucratic controls. Changes should be reviewed and approved by a supervisor who can be held accountable for maintaining office policy. If the prosecutor lets his assistants make decisions autonomously, without review, then he has no way of knowing whether the dispositions anticipated at charging have been reversed or changed at the trial stage. When this occurs the effectiveness of the pretrial screening program as measured by disposition is difficult to determine. It would be impossible, for example, to know whether a trial assistant is dismissing cases because the screening section is not charging properly, because the trial assistant is negligent in case preparation, or because changes in evidentiary strength over time force a modification to the original charge. To evaluate the effect of pretrial screening decisions and to maximize uniformity in prosecution, the pretrial screening function must be well integrated into a processing system that establishes accountability for the decisions. This means that the initial charging decisions should be reviewed and approved, that any subsequent changes be justified, and that the final disposition be the one expected.

When the prosecutor moves from a position of "no screening" to the establishment of a pretrial screening program, the move is and should be justified by the economic benefits to the criminal justice system. The act of reviewing cases and approving charges yields great savings in time and money. Once screening has been instituted, it should be viewed as a process, not as a unit attached to the office. If one looks at the charging decision as the first step in a series of decisions that will be made about a case, then it is necessary to describe and understand the decisionmaking process in the office so that controls and supervision can be placed about those decision points that are critical. Critical decision points are those that permit changes to the expected final disposition. Controls, such as review and approval procedures, should be established about that decision point. A decision flow chart should be prepared to visually define the conceptual framework needed to evaluate the screening and prosecution process. It shows that decisions are based upon information available to the decisionmakers who may select a certain action from a group of actions. It also shows that these conditions vary over time and over the prosecution process. Hence to evaluate the validity of any decision one should know the participants, the information available, and the choices available. The decision flow chart should also be used as a tool for the development of policy guidelines and standards as well as a management reporting system. Writing policy guidelines specifically addressed to the critical points will help to establish operational relevance to a policy manual.

A prosecutor should know not only what the disposition of a case is, but why, and at what stage in the process the disposition occurred. The decision flowchart should be used to provide a base for identifying where data should be collected. Dispositions should be recorded to show accountability. Dispositions occurring because of reasons beyond the prosecutor's control should not be used to evaluate prosecutorial performance. For example, a purified dismissal (or nolle) rate—that is, one which attributes responsibility to the proper participant in the system, is probably the most

sensitive of all disposition types in evaluating prosecutor performance. The most appropriate measure for the effectiveness of a charging policy should be the overall disposition pattern for all cases, including rejects, identified by location, time and reason.

The need for uniformity and consistency in the charging decisions is obvious. Yet we have seen that the tools for reaching these goals are generally inadequate. Consistency with policy suffers from the effects of organization and size. As the office increases in size, the problems of transmitting policy and monitoring its application increase proportionately. The prosecutor should ensure through staff meetings with policy makers as well as through written materials that the charging assistants are not operating with a policy different from the prosecutor's. Since a leading indicator of a breakdown in uniformity in charging is "assistant shopping", the prosecutor should use this alert to devote more time at staff meetings to the review of selected cases and the charging decisions made.

The need for bureaucratic controls to assure uniformity and consistency is obvious. If any assistant can make a decision without review or approval that changes the final disposition, then the prosecutor has no way of knowing whether the expected dispositions at charging have been changed or why. Under these conditions, the prosecutor should institute review and approval procedures that result in the first decisionmaker being aware of and approving the actions of the second decisionmaker. Since the preferred disposition is a rudimentary statement of policy, the prosecutor should verify through selected case review, that the assistant's preferences are in accord with his.

The need for quantitative tools and procedures to monitor uniformity is essential. Without them, the prosecutor must rely on the bureaucratic controls exemplified by a review of selected cases to see if the charging decisions are consistent with policy; staff meetings to discuss the cases and policy implications; and the development of policy manuals for general policy supported by memoranda, for interpretations and exceptions to the rule. The problems associated with uniformity of charging among the assistants are perhaps even more difficult to evaluate and modify without quantitative tools. We know that "assistant shopping" is a good indicator of a breakdoown in uniformity.

At the most, in addition to frequent staff meetings, the prosecutor has little recourse to other solutions except to provide for accountability through supervisory review and approval at those decision points where the expected final disposition can be changed.

It seems after this investigation that the underlying reason why many prosecutors have not viewed pretrial screening as the start of a decisionmaking process in their office and have not placed the highest priority on consistency and uniformity is not due to indifference but due to a lack of tools and procedures to help them. It is encouraging that recent research and developments have started to address this problem. But with so little knowledge existing in proportion to the need for new knowledge, a great deal of work is still to be accomplished. Further research and work in the development of quantitative case evaluation techniques similar to those incorporated in PROMIS and the Bronx Major Offense Bureau is of primary importance. The use of the "softer" procedures provided by management theory should be pursued and refined since they are currently the only available means to control these problem areas in prosecutorial decisionmaking.

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