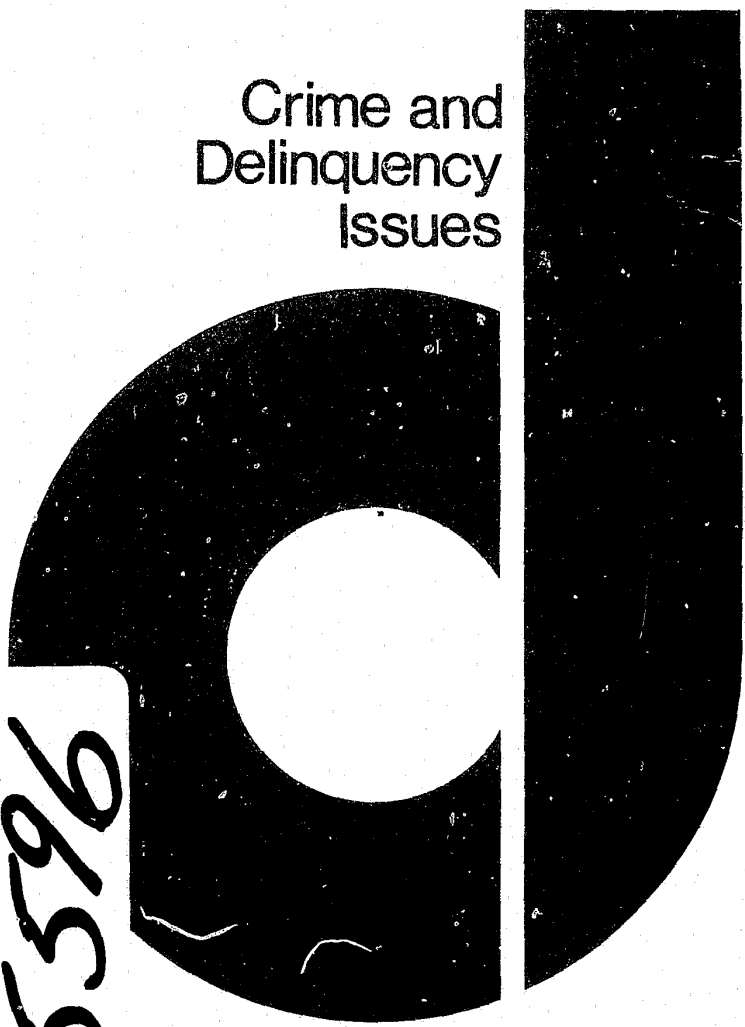
Decision-making in the Criminal Justice System: Reviews and Essays

Crime and Delinquency Issues



NATIONAL INSTITUTE OF MENTAL HEALTH

CHAPTER IV

Prosecution and Sentencing Decisions

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PROSECUTION DECISIONS

Once a person has been arrested, a variety of decisions may be made before that person leaves the adjudicatory system or is sentenced. These decisions focus on whether or not to press the case—i.e., to file charges (and the specific nature of the charges) and, if the decision is to prosecute, on the degree of vigor with which to prosecute. Generally, across the country, little is known of the criteria which provide the basis for these decisions; and even careful descriptions of the processes in various jurisdictions are lacking. Worse, there is even less information available concerning the effects of these decisions, either in terms of impact elsewhere in the criminal justice system or in respect to the later criminal careers of the persons accused.

A recent study in Los Angeles County sought to demonstrate the value of such analysis and description (Greenwood et al. 1973). Concentrating on following what happens to adult felony defendants, the authors identified these basic decision points:

> (1) the decision by the District Attorney on whether or not to file felony charges; (2) the decision by the Municipal Court as to whether the defendant should be held to answer on felony charges, should be dismissed, or should be treated as a misdemeanor; (3) the offering of inducements by the prosecutor or the court to encourage a guilty plea; (4) the decision by the defendant on whether to plead guilty, to submit on the transcript, or to go to trial before a judge or jury; and (5) the finding of the court as to the defendant's guilt and the appropriate sentence. (Greenwood et al. 1973).

These authors noted that prior studies of prosecution have been generally of two types. The first includes studies based on observa-

tion of how particular matters are handled or on interviews, generally concentrating especially on areas in which wide discretion exists and how it is exercised (Greenwood et al. 1973, p. v-5). In this category they refer to Kaplan's (1965) description from his own experiences, Newman's (1966) analysis of plea bargaining, Miller's (1969) study of variation in charging practices, Grossman's (1969) description of prosecutorial discretion in Canada, and the description by Graham and Letwin (1971) of preliminary hearing procedures in Los Angeles. They assert that:

> Each of these studies demonstrates that the prosecutor is allowed a broad range of discretion in performing his function; that the use of this discretion is difficult to monitor; and that there is considerable variation in how that discretion is exercised.

The second type of study depicts the flow of defendants through the adjudicatory process. Pointing out that such studies have been used to demonstrate the screening performed at each step in the process, they cite Subin's (1966), Washington, D.C. study, the President's Crime Commission (1967) study, and other studies of particular courts. A general flow model, permitting the estimation of branching probabilities at each step in the process (and associated resource requirements) has been developed by Blumstein and Larsen (1969). Such a model has considerable utility for planning and for simulation of the expected consequences of changing policies. As pointed out by Greenwood et al. (p. 5), however, the data necessary to support the use of such a model is not currently available in criminal justice agencies.

In the Greenwood study, aspects of both methods were used in order to seek to identify factors within the system that affect the treatment of individual defendants.

A notable example of the potential utility of classification methods as an aid to management in the prosecution area is found in the offices of the prosecuting attorney for the District of Columbia. Since the work load in that office (annually, allegations of 8,500 serious misdemeanors and 7,500 felonies) precludes vigorous investigation and prosecution of all persons charged, a quickly obtained daily ranking of cases was desired which would approximate the ranking to be obtained subjectively by experienced prosecutors after a careful review of the case information (Work, C.R. 1971 and Institute for Law and Social Research 1974). Based upon an extensive collection of objective data obtained for each case and preliminary study of the relations of such data items to experienced prosecutor judgments, a linear combination of scores on two dimen-

sions—offense severity and risk of new offenses—provides scores which enable the rankings desired.[1] The case rating, called an importance score, is derived from modified versions of the Sellin and Wolfgang (1964) severity scale and a scale developed originally as a parole prediction device (Gottfredson and Bonds 1961). This is one central feature of a general management information system designed to achieve a variety of goals, including:

1. The rapid identification of the more serious cases. (The approximately 16,000 cases per year which must be considered for prosecution in the District of Columbia must be handled by the United States Attorney, who serves as the local prosecutor, aided by about 75 lawyers assigned to the D.C. Superior Court (equivalent to a State court of general jurisdiction).
2. The provision of control of scheduling impediments to the adjudication of cases on their merits.
3. The enabling of "monitoring and enforcing of evenhandedness and consistency in the exercise of prosecutorial discretion." The prosecutor's policies, exercised through many assistant prosecutors, may be monitored with respect to equity concerns in areas such as:
   "The decision not to prosecute.
   The decision to upgrade, reduce, add to or subtract from the charges recommended by the arresting officers.
   The negotiation and acceptance of pleas.
   The decision to allow defendants entry into diversion programs.
   The decision to *nolle prosequi* or dismiss a case.
   The initiation (of), or concurrence in, case postponements."
4. Provision of a data base for research on prosecution decisionmaking.

SENTENCING DECISIONS

Once convicted the offender must be sentenced. The sentencing decision is at present guided unsystematically by often conflicting goals of punishment, rehabilitation, community protection, deterrence, and equitable treatment. It is a decision which must be made within constraints imposed by law and by resources (i.e., alternatives). It is a decision which must be made with little systematic knowledge of the consequences of previous decisions in similar cases. It is a deci-

[1]Personal communications, William A. Hamilton and Charles R. Work.

sion which must be made in the absence of data provided systematically to assist the judge in making equitable sentencing decisions, assuring that similarly situated offenders are similarly treated in the selection of sentencing alternatives.

The problem of equity implies a classification problem. Whatever meanings are assigned the concept, "justice," it appears that there may be general agreement that the concept, "equity," is an included but not synonymous concept. Thus, justice must include equity; equity does not ensure justice. But how is equity to be determined? If it means that similar offenders, in similar circumstances, are given similar sentences, then it is clear that equity is a statistical concept of classification. As decisions become less variable with respect to a given classification of offenders, they may be said to be more equitable.

Equity, of course, is not the only goal of sentencing decisions; and sentencing also implies a number of prediction problems. The courts at present, however, typically lack information about offenders which demonstrably is related to goals of changing the offender, deterring him or others, or community protection. Such information can be provided only by followup studies to determine the consequences of the decision, alternatives based upon information systems providing careful record keeping concerning the offenders' characteristics, the sentencing dispositions, and the results in terms of the goals of the criminal justice system.

An exception to the typical lack of attention to the classification and prediction problems inherent in the sentencing process is found in the attempt of one judge (Whinery et al. 1972) to develop "predictive sentencing" procedures. The project seeks to determine and test optimal sentencing strategies among five different treatment alternatives for youths classified according to likely recidivism (in terms of repeated traffic violations) when assigned to a given treatment modality.

Although there are other exceptions and a considerable relevant literature (Borjeson 1968, pp. 173-236; Sparks 1968, pp. 129-169; Wolfgang, Figlio and Sellin 1972, pp. 218-243 and pp. 252-255), the attention given thus far to analyses of sentencing does not match the importance of the problem. *It would be difficult to find other decision problems affecting critically the liberty and future lives of large numbers of people in which decisions are made with so little knowledge of their results.*

Presentence reports, usually completed by probation officers, are employed in most jurisdictions when penalties of more than 1 year may ensue (President's Commission on Law Enforcement and Ad-

ministration of Justice 1967) and in some jurisdictions when lesser penalties are at issue (Gottfredson and McCrea 1973). Typically, these reports follow from an investigation by the probation officer. Ordinarily he or she has talked to the defendant and, possibly, family, friends, employers, or others. The report typically is intended to present a comprehensive assessment of the defendant, his life situation, and it usually includes a recommendation concerning the court's disposition. Commonly, some identifying and demographic information is included, official and defendant's versions of the offense are summarized, as is the prior criminal record. Frequently, the report includes a life history; descriptions of the defendant's home and work situations; assessments of interests, attitudes, aptitudes, and physical and mental health; and other personality assessments. All are intended to clarify the factors resulting in the defendant's present difficulty and to assist in the court's disposition decision.

The judge may be presented in this way with a great mass of data concerning the offender before him; and this may provide him an increased feeling of confidence in his decision. But, while the courts typically keep records of decisions taken, they ordinarily do not keep score on the outcomes. As a result, information on the relevance of most of the assembled case data to rational decision-making for disposition (placement) of the offender is unavailable. Thus, presented with a wealth of data never assessed for its empirical relevance to his decision problem, the judge has exhaustive data but little information.

In chapter V, Professor Wilkins discusses the nature of decisions with particular reference to sentencing. He poses a number of issues which require resolution to enable advances in understanding of sentencing and hence an opportunity for increased rationality in these key decisions.

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