Criminal Prosecution and The Rationalization of Criminal Justice

Final Report

by

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Preface

Since 1968 when the federal government assumed a major responsibility for research and development in the administration of criminal justice many studies have been conducted. Some have focused on what can be called the middlescape of the justice process, that part of the process that lies roughly between accusation and final disposition (other than by real trial). This territory covers a lot of analytically distinct tasks (investigation, accusation, negotiation, prioritization, judgment and sentence determination) which are more or less clearly divided among a variety of law enforcement and judicial agents as well as citizens either as individuals (i.e., complainants, witnesses) or as official bodies (i.e., grand juries).

The research approach to the middlescape of justice has been to divide and conquer. The units of analysis have been either organizations (e.g., police, courts, probation, prisons) or processes (e.g.,investigation, charging, plea bargaining, sentencing). The natural inclination of the researcher is analysis, taking things apart. The reverse process of synthesis, while usually acknowledged as important, is less frequently practiced. This has been especially true in the criminal justice research perhaps because virtually all of that research has had a policy orientation.

The studies have been either simply descriptive of some process or organizational behavior, or evaluative of how some policy has performed. Their time horizons are typically short. They are rarely concerned with long-term trends or even tendencies; and they usually approach the policies of interest without regard to the larger political, economic and social forces in the environment which shape and influence those policies.

I know those studies well because I have been involved in many of them either as a researcher, reviewer, advisor or consumer. They frequently have left me wondering about the larger picture and the longer-term trends. I was moved to explore such questions especially as a result of the convergence of two things: the theoretical shift in criminology toward macro-level analysis, particularly the consensus-conflict debate, and my own experience of the American criminal justice systems.

While criminologists were arguing over the forces that determine the development and operation of legal institutions I was conducting interviews and making observations in numerous jurisdictions large and small, studying various policies and practices (plea bargaining, police-prosecutor relations, computer-assisted case processing, habitual offender sentencing). This experience of observing the administration of justice in many

jurisdictions, is naturally conducive to macro-level theorizing and historical inquiry.

In such travels one notices that for a legal order like the American one which subscribes to the principle of equal justice under law, there is a remarkable variation among the criminal justice systems. Nowhere is this more evident than in the organization of the middlescapes of justice. Even holding the law and the size of the jurisdiction constant there are substantial differences in the way things are done (Arizona study citation goes here).

As one moves between large and small and from state to state, the variation is stunning. Sometimes it seems like a kind of historical laboratory where different stages in the development of the American criminal justice systems are captured in a series of snapshots of moments in time.

This time-series can be seen best in the suburban jurisdictions that ballooned into large communities overnight. There the attempts to adjust to the realities of mass production of justice and the transition from informal to more formal procedures of administration are in various stages of development. In some places they are already into their second or third iterations while in others the need to adjust has either yet to be recognized or is being resisted.

Observing this diversity causes one to wonder about certain questions. How did things get so different? Do the differences make a difference (in any important way, such as the quality of justice or the effectiveness of policies)? Is it desireable, not to mention feasible, to enforce uniform national or even state-wide policies in widely diverse settings (such as a "no plea bargaining" policy in the "bush" as well as in the urban communities of Alaska). What are the driving forces behind the visible changes that are occurring; and to what extent can policymakers alter or shape these forces to achieve desired goals?

These questions are broad and historical ones which a person could spend an entire career pursuing. They are not easily reducible to the types of narrowly focused studies that qualify for funding under most grant programs, especially ones with policy-orientations like that of the National Institute of Justice. In the language of policy analysis, they address the larger "environment" within which policies are implemented. That environment is usually taken for granted as a point of departure for policy studies.

However, the importance of examining that environment and attempting to identify the longer-term processes and larger forces effecting it and making estimates of the directional tendencies, if not trajectories of the existing systems, is something that

practitioners, policy-makers and scholars alike recognize in various ways.

The judge or prosecutor or other official who has lived through those dramatic changes in suburban jurisdictions or who travels a circuit between urban and "bush" localities often talks about the differences that exist between the small and the large, the old and the new. Such discussions usually are anecdotal but frequently include speculations about what is driving what and where it is all going. While such guesses may lack sophistication, they indicate a real interest in broader analyses. These practitioners know intuitively the validity of the argument on behalf of such studies made by scholars who might appear to be merely promoting their own interests. They would agree with the noted historical sociologist Theda Skocpol's assessment of the importance of historical research:

> "Broadly conceived historical analyses promise possibilities for understanding how past patterns and alternative trajectories might be relevant, or irrelevant, for present choices. Thus, excellent historical sociology can actually speak more meaningfully to real-life concerns than narrowly focused empiricist studies that pride themselves on their 'policy relevance'."[1]

The study that follows attempts to be "policy relevant" in Professor Skocpol's sense. It is a broadly conceived look at prosecution systems. (Whether it qualifies as "excellent historical sociology" remains to be seen.) It expands upon my earlier work on the history of the American public prosecutor's office and the former place of the private victim of crime in the prosecution of criminal matters[2]. It is intended to increase our understanding of the American institutions of prosecution, particularly the American public prosecutor's office, by placing them in a larger historical and comparative framework.

It is guided by a theoretical scheme derived from Max Weber's work on rationality, law and bureaucracy. It began with what turned out to be a highly provincial, American view about the increasing importance of the emerging public prosecutor's office as the crucial institution in the modern administration of justice. It is ending with a more cosmopolitan and tempered view of the alternative ways which liberal democratic societies committed to the rule of law have sought to balance the often conflicting values at stake in the efficient and effective administration of justice.

The value of this study to the practitioner and the policymaker (it is hoped) lies in confirming their sense that these larger questions are important and in providing them with information and perspectives that begin to answer some of those questions.

Finally, I would like to note that it is to the credit of the National Institute of Justice that it has balanced its research portfolio with a funding opportunity that makes this type of broad-based, "basic" research possible, namely, the NIJ Fellows program.

Endnotes

1. Skocpol, 1984: 5.

2. McDonald, 1979; McDonald, 1976.

Chapter 1

CRIMINAL PROSECUTION IN A FREE SOCIETY

How should a free society arrange to accuse suspected criminals and dispose of such accusations? What values should the prosecution system serve? Should it be principally a system of social control, promoting order? Should it be principally a dispute resolution mechanism, seeking justice? Or, should it be committed primarily to the rule of law, to promoting legality even if this reduces order or results in some injustices?

Should the prosecution system of a free society be organized like an assembly line, mass producing dispositions; or should it selectively but intensively process only some cases or proactively attack strategic crime problems? If priorities are to be set and selections made, what should the criteria be and how should they be determined? How independent should the prosecution system be from political accountability?

Such questions have posed a predicament for liberal democracies since the advent of the mass administration of justice in the last century. Their vitality continues today as manifested by such diverse initiatives as the attempts to eliminate plea bargaining in the United States[1]; the institution of the new Crown Prosecution Service in England[2]; the revisions of the codes of criminal procedure in West Germany in 1975[3] and in Italy in 1988[4] where a form of "plea bargaining" has been introduced; and the recommendations for the simplifying and expediting of justice of the Council of Europe.[5]

The problem underlying these initiatives is the attempt to rationally manage finite criminal justice resources in the face of enormous caseloads and intractable crime problems while at the same time abiding by the principles of legality, liberty and democratic accountability to which these nations are committed. The balances struck among these competing values by the various countries reflect their particular histories. Their institutions of criminal justice differ as do their views regarding the relative priority of the values at stake and the best way of institutionalizing them.

While these differences are not to be minimized, in all of these systems the prosecution function is emerging--albeit at different rates--as the central locus for resolving this predicament. This reflects the extension to the criminal justice system of the rationalizing forces of the capitalist economy--forces which affected the police and corrections before reaching the center of the justice process. That these forces are

transforming the public prosecutor's function into a system manager should not be surprising because the essence of the prosecution function is management and because the prosecution process is situated at a strategic managerial point in the overall process of administering criminal justice.

Lying between suspicion and formal adjudication, the prosecution function holds an important key to the distinctly modern problem of the administration of justice, namely managing the mass production of justice. Whereas in the past the problem was to find ways to get cases into the system, today the problem is to get cases out of the system. Today the state is faced with the choice of balancing limited justice resources against overwhelming demand for them.

This has presented the state with a new option in its response to crime. Instead of the individual approach to production characteristic of a skilled craftsman and common to the justice of earlier times, the modern state may take the approach of the large corporation. It may set priorities and screening policies which yield a particular mix and volume of cases allowed into the court system and to be disposed of after differing amounts of legal process. In other words, the organization of modern law enforcement efforts can be fine tuned to achieve a degree of efficiency and rational calculation of means-ends allocations never before possible.

The dilemma has been, however, that the same societies that created the need for the mass administration of criminal justice also established legal and political principles restricting the possibility of organizing the justice process according to the logic of pure rationality. What is more, the legal restrictions on the process have increased as caseloads have increased thus forcing justice systems to find even greater efficiencies as well as shortcuts around their expanded legal processes. Ironically, in attempting to protect the values of legality and liberty by increasing the formal rights of the accused, liberal states pressured their justice systems into finding ways to dispose of swollen caseloads through means other than the full exercise of formal rights.

The final complication is the matter of justice. Increasing the efficiency of a justice system can be done compatibly with a certain form of justice, namely procedural justice. Costly, time-consuming procedures needed for the full exercise of formal rights--such as the right to a trial by jury--can be avoided justly by the state by a simple expedient. A new procedure for waiving these rights can be created and administered with legal impartiality--as has been done in America in regard to waiving the right to trial as well as various other rights in exchange for pleading guilty.[5]

However, as Max Weber made clear, procedural justice is only one kind of justice and achieving it strains against the doing of a second kind of justice, substantive justice. The two are perpetually antagonistic and of the two modern legal systems have tended to emphasize the former over the latter. Substantive justice refers to the justness of outcomes. It emphasizes particularism whereas procedural justice is oriented towards universalism.

Substantive justice requires that the individuating characteristics and circumstances of the particular case be fully considered and that the outcome reflect some proper balance between those specific facts and some abstract sense that "justice" was done. That is, the final outcome must be just in a larger, more intuitively correct or philosophically acceptable sense. Thus, for instance, take the case of the destitute old man with no prior criminal record who has been robbed repeatedly after cashing his social security check and who after being unable to get police protection or other means of legitimately cashing those checks--which are his sole means of support--carries his gun with him and is prosecuted for doing so. Procedural justice would be done in his case if he were treated as every other first offender charged with unlawful possession of a weapon (which carries a mandatory prison sentence); but, arguably substantive justice would not.

The difficulty with substantive justice is that it is not capable of being measured empirically. In contrast, procedural justice has a deceptively quantitative quality to it. It can be reduced to a check list of rights, waivers of rights and signatures. In the iron cafe of criminal justice formalities that modern societies have erected things that can be counted tend to be the things that count. Nevertheless, there is an uneasiness with simple procedural correctness. There is a sense that the new efficiencies are creating new injustices.

I. The Development of Prosecution Systems

Accusing someone of violating the criminal law and gathering and submitting the proof to some judgment mechanism constitute the core tasks of criminal prosecution. Societies differ in the ways they organize and govern these tasks. These arrangements have changed with changing political and economic conditions.

In the course of Western history three major stages in the development of prosecution systems can be identified. The first is associated with the birth of true criminal law. It occurred with the transition from stateless societies in which virtually all wrongs are regarded as private matters (or torts) to societies in which wrongs came to be conceived of as injuries to the larger community, i.e. crimes.

Overlapping this transition was the beginning of the second stage of development. It lasted for centuries and encompassed the growth of and experimentation with a variety of institutions and procedures by which the political community replaced the kinship group as the means for redressing harms and injuries to persons, property and other interests. The problem was to find ways to get prosecutions initiated and conducted. Private personal gain, civic obligation and governmental responsibility were each used with varying degrees of success.

During this period the arrangements for the prosecution of crime came to be organized in two different styles loosely referred to as "accusatorial" and "inquisitorial" systems. The former is associated with Anglo-American history and the common law tradition. In it criminal prosecutions take the form of private suits between individuals conducted before an impartial judgement finder (jury or judge). The latter is associated with Continental history and the civil law tradition. In it prosecutions assume the form of an official inquest conducted by impartial functionaries on behalf of the state.

Each of the national legal systems within these two styles has its own long and varied history. But since the industrial revolution and the advent of the liberal state there has been some convergence among them as all systems have responded to the problem of rationally managing their criminal justice system resources. The quantum leap in the demand for those resources beginning in the last century triggered the third and latest stage in the development of prosecution systems.

Central to this stage is the managerial regulation of the decision to prosecute with an eye towards mass producing justice. It involves state regulation of the volume and mix of cases flowing through the justice system to conserve resources and target selected aspects of the crime problem. Unlike earlier times when the problem was to find ways to get the law prosecuted, today's problem is to get cases terminated as quickly as possible or keep them out of the system altogether.

The modern state was largely responsible for creating the system of mass-production justice by assuming the cost of crime control and setting about to achieve a degree of public order and crime repression never before undertaken. Ever since the birth of criminal law when societies first distinguished between offenses against the group as a whole ("crimes") and those against particular individuals ("torts") the enforcement of law has relied upon a haphazard system of private and public efforts with a good deal of non-enforcement of law expected and tolerated.

But the modern state with its bureaucratic apparatus and its goal of justice for all brought about a second societalization of

law. It extended the surveillance of the law into areas of the community formerly ignored; it gave all citizens free and equal access to the machinery of criminal justice; it established professional police agencies to respond to all complaints initiated by citizens and to initiate others on their own; and it replaced the religious-symbolic standard for the doing of justice with the scientific one. That is, it replaced the ritual and symbolism of the criminal justice process of former times with the rational calculation of the means necessary to eliminate crime--in much the same way as calculating the means needed to reduce illnesses or increase productivity of machinery.

The underlying principle of the modern administration of criminal justice was supplied by Enlightenment thinkers like Caesare Beccaria when he argued that the justice system must be judged by the extent to which it actually reduced the amount of harm done in society (an empirically measurable outcome--at least in theory) rather than by its ability to administer god's justice on earth (a clearly unmeasurable goal). Crimes themselves should be measured by the degree of their harmful consequences rather than their offensiveness to god.

A. Pre-modern Administration of Justice

The particulars differed between Anglo-American and Continental jurisdictions; but, in general, the enforcement of law in pre-industrial societies had relied heavily upon a combination of civic obligation and the initiative of private individuals to pursue criminals, make arrests and bring about prosecutions.[7] These arrangements had been adequate for simple, homogeneous, settled agrarian communities. But, as the world changed they reached their limits.

In England citizens had been obliged to respond to the "hue and cry" raised by their neighbors in pursuit of suspected offenders; they had been obliged to take their turn serving as constables or to participate in grand juries or coroners's juries that accused members of the community of wrong-doing. Such arrangements worked satisfactorily as long as England consisted of a set of small, rural, settled, agrarian communities governed by a feudal system of law.

With the advent of modern history and the rebirth of international trade in the fifteenth century, the effectiveness of these arrangements began to decline. Villagers who might be willing to respond to cries for assistance from fellow villagers were not responsive to similar cries from foreign traders whose goods were stolen or ships wrecked or pirated in the vicinity. Artisans, merchants and farmers became increasingly unwilling to take time away from their livelihoods to serve in the unrewarding position as constable.

For several centuries efforts were redoubled to prop the old arrangements. Laws were enacted holding communities collectively liable for thefts in their areas. An elaborate system of rewards either for the successful prosecution of criminals or simply for the return of stolen goods developed as a means to stimulate greater efforts by private citizens. Constables and sheriffs were penalized for failure to do their duty. Magistrates were permitted to charge fees for their services. Private citizens from virtually all social classes formed associations for the prosecution of felons which operated like insurance companies on behalf of their memberships, paying the costs of detection and prosecution of crimes against their members.

These structures naturally led to corruption of various sorts and to highly a uneven administration of justice. The rewards system spawned an unscrupulous profession of thief-takers who earned livings prosecuting offenders and collecting fees. The entrepreneurial types encouraged by this privatized arrangement quickly recognized that they could reduce their risks and maximize their profits by various smart business practices.

Rather than investing in the time-consuming and potentially dangerous job of tracking down thieves, it was far more rational to simply arrange with thieves to steal merchandise which would then be returned by the thief-taker to its owner for the reward. This could then be split with the thief who could then move on to the next job. Similarly, rather than waiting for the truly predatory people to commit crimes, it was easier to lure innocent people into compromising circumstances that could then be used to successfully but wrongly convict them of crimes (such as planting the instruments of embezzlement on a country boy arriving the city).

In England and America the change to salaried, full-time police agents--beginning in 1829 with the establishment of the Metropolitan Police of London and rapidly copied in America--was expected to be a vast improvement in crime control over existing methods. On the continent "police" forces had been established over a century earlier.[8]

Modern societies are policed societies. Over a century ago they responded to the problems of crime and disorder by establishing professional police agencies and adopting a new attitude about the state's responsibility for crime control. The modern nation state began to assume the bulk of the cost of crime control and set about to achieve a degree of public order and crime repression never before undertaken.

The concern for efficiency is not new or unique to advanced capitalist societies. History is littered with efforts to make

legal systems more efficient. But the scale of the problem has changed. Mechanisms for generating caseloads were less powerful in the past. Formerly, victims seeking prosecutions had to pay fees and to risk personal injury, court costs for dismissed prosecutions and countercharges of false accusation. Grand juries which were supposed to meet regularly, receive accusations from the public and to denounce other offenders on the basis of their own knowledge were notably underzealous. Other officials in charge of enforcing order such as constables, justices of the peace and churchwardens had to be threatened and forced into performing their duties.

B. The Modern Police And Mass Justice

The problem of underenforcement changed profoundly with the advent of the modern police institution. Pre-modern policing relied upon a mix of private voluntary efforts and part-time, fee-based official policing. In contrast, the modern police are full-time, 24-hour-a-day-7-day-a-week, salaried employees of the state with greater legal authority to arrest and greater protections against wrongful arrest. In short, modern policing is organized in bureaucratic form. This entails a quantum leap in caseload generating. As Weber noted:

> The decisive reason for the success of bureaucratic organization has always been its purely technical superiority over every other form. A fully developed bureaucratic administration stands in the same relationship to nonbureaucratic forms as machinery to nonmechanical modes of production.[9]

Whether bureaucratized policing is a superior form of crime control remains to be seen; but, there is no doubt about its superior ability to produce caseloads. No longer would prosecution be neglected for reasons such as the one found in the court records of Henrico County, Virginia in 1695: "some of the Grandjury being Sick, & others out a Tradeing with the Indians".[10] Not only do salaried police officers willingly generate cases they pressure courts to accept them and give them a full hearing. Indeed caseload volume is the kind of tangible measure of success that public bureaucracies like the police substitute for difficult, if not impossible, to obtain true measures of their achievement of goals such as crime control or justice. Pressures to justify budgets and "crack down on crime" easily translate into increased caseloads.

Whether the professional fulltime police reduced the amount of crime in society. Part of the problem here is in trying to obtain accurate measures of how much crime actually was occurring before and after the inauguration of the modern police. But it is known that once these organizations were established they did

generate caseloads and a lot of those cases would not have been cases but for the existence of the professional police. Large proportions of the caseloads of the nineteenth century consisted of cases of public disorder, the types of cases that probably would not have resulted in court cases if police agents were not available to initiate the action."

The response to the problem of caseloads has varied in both timing and form within and among national legal systems. While substantial differences still exist, it is significant that in England as in the United States and other advanced industrial nations a bureaucratized public prosecutor has emerged as a key component of the machinery of formal social. This appears to reflect a transition to a new stage in the development of the prosecution apparatus, a change that is almost as significant as the transition from private tort to public crime. In this new stage, societies are reducing some of the broad access to their court systems which they granted over the years. The new transition is from public crime to public crime which the state will allow to be prosecuted. One strategy for doing this is to rely on a legally trained, politically accountable, and bureaucratically organized public official to filter the caseloads and select cases along criteria that can be adjusted more finely than the categorical language of the law allows. A second approach is to depenalize and decriminalize crimes so that they might be treated either as administrative matters or by some summary procedure or simply ignored.

It is occurring in and the search for means to mass produce justice. This has involved the establishment of mechanisms by which the volume and mix of cases flowing through the justice system can be regulated to conserve resources and to focus the machinery of justice upon selected aspects of crime. It is occurring in all advanced capitalist societies and represents the fullest degree of the societalization of the machinery of criminal justice. Modern states are seeking ways of reducing the broad access to the criminal courts which developed over the years and have partially "re-privatized" the criminal law.

Modern capitalist societies with liberal democratic traditions face the critical problem of achieving maximum efficiency and effectiveness while abiding by their legal and political values and operating within their inherited institutions. This is linked to an even more fundamental problem, namely maintaining the legitimacy of the sociolegal order in a era of increasing costs of social control. The requirements that justice be administered under the rule of law and with accountability represent obstacles to the pursuit of pure organizational rationality. Solutions must balance the conflicting values of rationality, legality and justice.

While the official goal of today's bureaucratized justice systems is to control crime under law, the immediate daily task is to cope with caseloads. Unlike earlier times when the problem was to find ways to get the law prosecuted, today's problem is to get cases terminated. They must be channeled as quickly as possible into dispositions that are both legally defensible and socially useful.

C. Public vs. Private Justice

The growth of the modern nation state was associated with the emergence of the peculiarly modern view of the distinction between matters public and matters private. That distinction became sharper and firmer than previously imagined. Nothing in the current movement to reprivatize parts of the justice system alters the essential principle underlying this fundamental shift.[12] The state, not the private citizen or other intermediary bodies, has the primary responsibility for and exclusive authority over the administration of criminal justice.

This difference was not a matter of degree but of kind. Its significance can best be appreciated by pointing out that the textbook description of the state as having "the monopoly on the use of violence" refers to what constitutes a historically recent and radical change in the organization and legitimate use of coercive social power. It involved the second societalization of criminal law, that is the commitment of the nation state to replace the haphazard system of pre-modern administration of justice and to assume the burden of attempting to bring all suspected violators of law to justice.

When the French Revolutionaries abolished their patrimonial system of justice there existed thousands of "privately" owned courts which feudal lords and powerful clerical orders had bought, subdivided and sold for hundreds of years. It is estimated that only about one third of the justice administered in France until that time was being administered by the king's courts--which we moderns with our over-simplified public-vs.-private dichotomy want to call the "public" courts.[13]

In Germany the patrimonial courts were not abolished until 185-. In England for centuries the lord of the manor was judge in his own manorial court and had his own "prosecutors" known as various kinds of stewards. Offenses against the lord's woods were prosecuted by the warden. Clearly Madison's injunction that a man should not be allowed to be a judge in his own court was not an idle reference.[14] In the American colonial period religious congregations had their own "police" which enforced their own religious laws.[15] Such arrangements continue to exist in nations which still operate under feudal-like principles as can be seen in Saudi Arabia where the "religious police" have been quite harsh in

their enforcement of religious laws.[16] The death knell of such arrangements was the emergence in the West of liberal bourgeois social theory--liberalism.[17]

In addition to the privileged use of power in patrimonial courts, feudal and ancient societies long recognized the power of the head of the household to administer justice within the house as a kind of special "familial" court. It was the power of the "pater familias." What seems bizarre and tyrannical to the modern person living in the two bedroom bungalow with his 2.3 relatives, made sense in a time when people did not leave their houses to go to work but stayed right there and may have employed many servants, artisans, itinerants and other strangers.

With the advent of the modern capitalist nation state the use of coercive social power for the purposes of maintaining order and administering criminal justice was consolidated into one locus, the legal order of the state. Although the private exercise of coercive social power has been allowed to continue in various forms, this power is regulated and controlled by the state. There are, for example, thousands of private police agencies in the United States. But, they are licensed by the state and their arrest decisions are reviewed by the state's prosecutors and judges. Also, 34 states still allow for private prosecutors to pursue criminal charges in the public courts; but, these provisions are rarely used and generally must be done with the leave of the court or the public prosecutor.[18]

The consolidation of state control over the machinery of criminal justice did not happen overnight, did not become monolithic and did not happen so much at the level of legal theory as legal reality. In England, for example, reformers began calling for a system of public prosecutors to replace the chaotic and inefficient system of private prosecutors in the eighteenth century. But it was not until 1985 that a true system of public prosecutors was finally established. In West Germany where the (formerly Prussian) state has monopolized the right to prosecute--as continental countries do--since the beginning of the nineteenth century, there nevertheless exist certain offenses which the state allows to be prosecuted only at the discretion of the private citizen.[19]

This profound shift in the state's responsibility for the control of crime is largely missed in the record of developments in legal theory. Indeed the classic scholarship on the development of criminal law prevents one from recognizing it and its full significance. The tradition has been to rely upon the ancient legal distinctions between "public" and "private" wrongs, "crimes" vs. "torts", and "criminal law" vs. "civil law". Calhoun asserts that these distinctions emerged in the sixth century B.C. in Athens when several new legal concepts were developed which distinguished

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"true criminal law" from primitive tort law:

> "(1) It [criminal law] will recognize the principle that attacks upon the persons or property of individuals or rights thereto annexed, as well as offenses that affect the state directly, may be violations of the public peace and good order. (2) It will provide, as part of the ordinary machinery of government, means by which such violations may be punished by and for the state, and not merely by the individual who may be directly affected. (3) The protection it offers will be readily available to the entire body politic, and not restricted to particular groups or classes of citizens."[20]

This juridical distinction between public and private legal spheres has existed (albeit discontinuously) ever since; but it has had a checked and confusing past. It has vanished and reappeared with the loss and recovery of civilized urban life. Thus one reads in the histories of the northern Italian cities emerging from the "dark ages" in the 11th and 12th centuries of the struggle to re-establish and expand the scope of wrongs against the public interest. That expansion of public law came at the expense of public custom--which had included the right of private vengeance.

The "public-private" juridical distinction has been at the center of the struggle by and within elites to consolidate their power. The results have sometimes left us with the kind of contradictory legal terminology that baffles the scholar as much as the layman. For example, the ordinary procedure under which criminals were prosecuted in Imperial Rome was known as the procedure extraordinum. The ordinum procedure (i.e., "ordinary" procedure) was the old public legal process that had been developed over centuries by the Roman people during the days of the Republic. The extraordinum procedure was invented by the Roman emperors as a way to extend their control over the people by gradually replacing the old republican courts with the emperors's own courts. An increasing list of crimes were to be tried via the extraordinum process. In the hopelessly inadequate terminology of modern life it can be said that the emperors substituted their "private" courts for the peoples' "public" courts thereby making the imperial courts the "public" courts.

An analogous development happened in England in the struggle of the early kings to wrest power away from the local barons. Crimes were defined as violations of the king's peace and were tried in the king's courts, not the baronial courts. By the twelfth century in England the system of royal courts with their itinerant circuit justices had largely superseded the system of patrimonial courts. This juridical legerdemain was more successful in England than on the continent.

The continental kings were never able to strip the feudal

magnates of their rights to exercise judicial and penal powers. A crazy-quilt of geographic jurisdictions divided among various powers--the king, the nobles, religious orders, towns, guilds--emerged resulting in legendary accounts of conflicts of jurisdiction among courts competing for the business of trying cases. Jurisdictional lines sometimes ran down the middle of streets or through houses, so that the jurisdictional question hinged upon whether the crime had been committed in the livingroom or the bedroom.[21]

Notwithstanding these differences the misleadingly simple legal dichotomy between public and private wrongs has been preserved for centuries. It is misleading not only because its implies greater precision and compartmentalization than exists in reality; but also because it fails to convey the enormous new significance attached to the modern meaning of the phrase, "public wrong". Its pseudo-precision can be quickly discovered by asking American prosecutors what their office policies are regarding bad checks (technically, violations of laws against uttering checks which are either worthless or have insufficient funds).

The big city prosecutor regards such things as strictly "civil matters" which can not be allowed to clutter up the criminal court's docket. The suburban prosecutor regards them as sometimes criminal and sometimes civil depending on various factors--how much is involved, whether the victim can afford to go to civil court, what the local business community wants. The small town prosecutor regards them all as criminal matters.

Victims of crime (in Anglo-American systems of justice) rediscover the public-private distinction daily. Not infrequently this happens because of the conflict of interest that the individual victim feels he or she has with the state. Modern criminal justice is not intended to vindicate the individual victim. The robbery, burglary or rape happened to the individual; but that does not give him or her any legal rights over the disposition of the case as a criminal matter.[22] All of those rights belong to the state; and the state's interest lies in doing what is best for an abstraction known as the "public good" even at the expense of individual victims.

It is true that victims exercise a lot of <u>de facto</u> control over criminal justice decisionmaking. Between an event that might be a crime and a conviction for that crime, there is a long sequence of decisions that must be made by victims, witnesses and criminal justice officials. Failure to define events as crimes, failure to report crimes to the police and the unwillingness of victims to prosecute account for an enormous amount of unprosecuted crime whose fate has been determined by victims and other citizens.

Nevertheless, in those cases where an arrest is made and the

case is presented to the (Anglo-American) court it is the public prosecutor who makes the decisions as to whether the case should be prosecuted and how. In so doing he/she must keep foremost in his/her mind the larger "public interest". Although American prosecutors have been told by standard-setting professional bodies, that they may take the victim's interest and well-being into account in deciding whether and how to prosecute a case, they have also been told that when faced with the dilemma of high stakes on both sides--i.e., the victim's interests vs. that of the public--they should decide for the public. Private interests are to be subrogated to the public good.

Some conflict theorists are fond of dismissing the idea of the public good as at best a meaningless abstraction and at worse a disguise for elite interests. But, the prosecutor faced with the moral dilemma of whether to further traumatize the child victim of a sexual offense or dismiss the only case against the serial offender knows the public interest to be neither an empty abstraction nor a cover for narrow interests.

The conflict theorist's skepticism is a healthy methodological first principle. The possibility of deception must always be considered. But, it should be recognized that there is a real and legitimate meaning to the concept of the public interest which is not invalidated by the fact that particular groups regularly mistake--unwittingly or not--their private interest for that of the community as a whole.

Utilitarians like Caesare Beccaria and Jeremy Bentham are misleading in their suggestion that the concept of the public interest is readily quantifiable in the form of something like the greatest happiness for the greatest number. But they are correct in implying that the concept involves a matter of degree rather than the simple dichotomy of criminal vs. civil wrongs. Equally important is their related vision of the law as an instrument of social engineering to be consciously used to do justice for as large a number of people as possible. The two views are fundamentally related to each other and to the emerging political economy of liberal capitalism with its rationalist approach to all spheres of social life.

When Beccaria, Bentham and other Enlightenment thinkers severed criminal justice from its traditional religious foundations they substituted science and the logic of utilitarian calculation of means and ends as the new guiding principles for justice. Two centuries later one finds these principles being brought to full flower in American in such forms as career criminal programs guided by statistical-based prediction tables estimating future dangerousness of the offenders.

The police were to be instrument for controlling crime

scientifically. All crimes and criminals were to be suppressed. All laws were to be enforced. Law could be seen as an instrument of social engineering. The criminal law could be truly "public" law because now the general public would pay for the policing of the entire community. Private interests would be replaced by "public interest" in Beccaria's sense, which does not refer to some sense of the majority's will, but rather the rule of law. If there is a law, then it should be enforced.

D. Legality, Liberty and Democracy

Modern liberal states seek to rationally manage limited criminal justice resources by being efficient. But in the liberal state the pursuit of organizational rationality is not the only value shaping the organization of criminal prosecution. Concern for freedom and the demand for accountability as required by the principles of democratic theory are profound countervailing forces in determining the means by which criminal prosecution is organized.

The basic tenet of liberal theory has been that freedom in society is possible only under the rule of law, i.e., the principle of legality. Only when official power is restrained by rational principles of civic order has the essential element of the rule of law been achieved. To the extent that legality is achieved there will be an environment of constraint upon official decisionmaking. There will be "tests to be met, standards to be observed, ideals to be fulfilled".[23]

Legality has to do mainly with **how** decisions, policies and rules are made and applied rather than with their content. Sometimes, however, legality does determine the content of a legal rule or doctrine. This happens when the purpose of the rule is precisely to implement the ideal of legality, itself. The most obvious examples are codes of criminal procedure which specify the conditions which must be met before a penal sanction may be imposed. In addition, much of constitutional law directly serves the aim of creating and sustaining the "legal state", as for example provisions for the separation of powers. Also there are rules guaranteeing certain substantial rights which the ideal of legality is meant to protect. Primary among these are "civil rights," which carve out specific freedoms such as freedom of speech, religion, assembly as well as rights to specific protections or principles such as the right to an attorney, to due process and the equal protection of law.

The ideal of legality is achieved to the extent that arbitrariness in decisionmaking is reduced. Contrary to common misunderstanding, the reduction of arbitrariness is not synonymous with the reduction of discretion. Rather, as Professor Selznick has argued, discretion may be exercised more or less arbitrarily.

It is arbitrary when it is exercised whimsically, or is governed by criteria extraneous to legitimate means or ends. It is compatible with the rule of law when it is governed by rules that are logically, if not historically, prior to the case at hand.[24]

Selznick's distinction between judicial and administrative discretion helps clarify the meaning of the rule of law even further. Discretion is compatible with the rule of law when it remains essentially judicial rather than administrative. The objective of judicial discretion is always to find a rule or rule-set that will do justice in a special class of situations. In contrast, administrative discretion is of another order. The purpose of the administrator (even if he/she actually is a judge) is not to do justice but to accomplish some particular outcome, to get the work of society done rather than to realize the ideals of legality. Adjudication also get work done, in settling disputes, but this is secondary not primary. Judicial discretion is thus governed by the search for universal rather than particular criteria of assessment. It is the search for the legal coordinates of a particular situation in contrast to the administrator's proper effort to manipulate the situation to achieve a desired outcome.[25]

E. Anglo-American vs. Continental Developments

It is out of the growth of legal shortcuts that the role of the modern public prosecutor has been assuming its crucial managerial importance in Anglo-American justice systems. Form has followed function. The legal status of these shortcuts has varied from problematical to legally approved. Sometimes their status has remained indefinite for long periods until challenged.

In the United States, for example, public prosecutors made considerable use of the power of dismissing cases (nolle prosequi) throughout the second half of the last century--which we can believe was often done as a caseload management technique.[26] In 1913 in Maine the power was questioned by defense attorneys prompting Judge Emery with a history of the prosecutor's power of nolle prosequi and a defense of its use.[27] The more obvious and controversial caseload management tool has been plea negotiations. It was used for that purpose for over a century before the Supreme Court ruled in 1971 that it was a constitutional and "essential component" of the modern administration of justice.[28]

In England plea negotiating had been regularly practiced but was widely treated as if it did not exist[29] and was not legally approved of until 1970.[30] A few years later it was described as "part of the daily currency of the administration of justice: a necessary and desirable part both in the magistrates' courts and the Crown courts".[31] As of that time England had no public prosecutor's service, no one with the responsibility for the prosecution of crime.[32]

Such a service was established in 1985 and assumed the case-dismissing and plea-negotiating roles formerly performed by others. The system-coordinating purpose of the new Crown Prosecution Service is stated in the enabling legislation. One of the Service's primary goals is to "achieve superior efficiency and cost effectiveness"; and "to achieve greater coherence of policy, consistency and fairness".[33]

On the continent the offices of public prosecutor have much longer histories but their role as system-manager and policy-coordinator has been deliberately suppressed in the name of legality and freedom. Some American observers claim that that role is indeed being performed--at least partially--by the continental public prosecutors on a sub rosa, ad hoc basis.[34] But such claims are misleading. While the continental system have developed some functional equivalents of American methods of controlling caseloads, the continental systems have not yet allowed their public prosecutors to assume the role of policymaker.

The idea of judicial officers--which their prosecutors are--making policy is anathema to their legal and political ideals. German, Italian and French public prosecutors are not permitted to set priorities on a systematic, organization-wide basis whereby resources might be concentrated against selected targets on some rational basis such as the dangerousness of offenders, predicted recidivism, cost-benefit ratios, etc. Such rationalization of their system resources is prohibited by their legal tradition and in Germany and Italy by the principle of obligatory prosecution (known in Germany as the legality principle, Legalitatsprinzip, in Italy simply as the principle of obligatory prosecution[35]).

Rather than use their public prosecutors as system managers, continental countries have continued to rely upon their legislatures to make necessary adjustments in their systems's responses to crime and caseloads. They have relied upon decriminalization, depenalization, amnesties, and efforts to streamline their procedures. Relying upon the legislature is more in keeping with their tradition. Civil law countries have always expected the lawmaker to promulgate the legal code and the judges to merely apply it. This principle was reinforced with a vengeance after the French Revolution.[36]

In continental history tyranny had become synonymous with the "rule of judges". Liberty could only be preserved if all policy-making powers were absolutely restricted to the legislature. Judges had to be narrowly reduced to merely applying the law. All discretion had to be eliminated. Enlightenment thinker Caesare Beccaria had framed the choice clearly. It was a choice between types of errors that legal systems with or without judicial are likely to produce. For him the correct choice was patent.

> "The disorder that arises from rigorous observance of the letter of the law is hardly comparable to the disorders that arise from interpretations. The temporary inconvenience to of the former prompts one to make the rather easy and needed correction in the words of the law which are the source of uncertainty, but it curbs that fatal license of discussion which gives rise to arbitrary and venal controversies. When a fixed code of laws, which must be observed to the letter, leaves no further care to the judge than to examine the acts of citizens and to decide whether or not they conform to the law as written...then only are citizens not subject to the petty tyrannies of the many...."[37]

The principle of obligatory prosecution was advanced in Germany as part of the liberal reforms 1848. It was intended to eliminate political manipulation of prosecutorial power. The king had manipulated prosecution decisions to suit his pleasure. The new public prosecutor--modelled on the French procureur du roi--would be protected from such interference by this legality principle. It forbade any exercise of discretion in the decision whether, on the basis of his investigation, he had evidence sufficient to press charges. The principle was enacted in the Code of Criminal Procedure of the German Reich in 1879 which has remained in effect (with certain modifications) even after the founding of the German Federal Republic in 1949.[38]

Although its liberal creators saw the principle of obligatory prosecution as a great advance for liberty they did not anticipate its organizational impact a century later. The principle means that despite the fact that German and Italian prosecutors are members of a hierarchically organized institution of the state, the organizational advantages of policy control from the top are not allowed to operate. Policies regarding the prioritizing of prosecution resources throughout the country so that particularly egregious crime problems or types of offenders could be targeted with special efforts can not be set.

The chief prosecutor can not impose policies on the assistant prosecutors. Rather all assistants are autonomous with respect to the choice of crimes to investigate and cases to which highest priority is devoted. More accurately it should be said that the fiction is maintained that no choice are involved at all. Rather, prosecutors are supposedly proceeding against all cases and are guided only by the rule of law.

It remains to be seen how long continental systems can cope with their crime problems without resorting to some more systematic means of managing their court resources. Legal traditions do not change quickly but neither do they remain completely fixed. Recent

developments in Italy suggest that the need for such a managerial capability is being felt despite the inauguration in 1989 of their new code of criminal procedure which was supposed to have achieved the "maximum simplification of procedures and the elimination of every non-essential activity."[39] Calls for making the now autonomous prosecutors responsive to policies set by the Ministry of Justice are being heard.[40]

Meanwhile in the United States where approximately 30,000 attorneys spread over about three thousand separate, federal, state and local prosecution agencies located in 51 separate sovereign juridistions, the possibility for nationwide coordination of prosecutorial resources does not exist--as it does in Italy. But, other means of rationalizing the justice system's operation are being used. Many of them involve the local public prosecutors's offices and virtually all of these take advantage of American law's grant of broad discretionary powers to public prosecutors.

Virtually all of the methods used involve some form rational calculation of means and ends, of finding the most efficient use of prosecutorial and court resources. All of them involve the setting of priorities and attempts to match the cost in prosecutorial resources with some anticipated benefit in crime reduction. Scientific studies and computer technology as well as the application of managerial logic of bureaucratic organization are very much a part of rationalizing process.

The range of methods includes: early case screening systems; career/habitual/repeat offender priority programs--some employing numerical weighted formulae developed from studies identifying characteristics predicting dangerousness; controlled plea bargaining policies; computer-assisted case prioritizing systems; computer-assisted case charging programs; and special police-prosecutor strike forces or teams or coordinating mechanisms.

These applications represent the fullest development of the public prosecutor as system-manager. This in turn represents the culmination of over a century of change in the organization of the American justice system during which the public prosecutor has been assuming this modern role. It means that the American public prosecutor--most typically in the form of the local district attorney--provides an opportunity for understanding the special problems of law, order and justice associated with the application of the most advanced techniques for rational administration of criminal law.

Although American law grants public prosecutors wide discretion, their exercise of discretion both with and without the assistance these aids to rational calculation has raised questions as to whether legality and liberty are being compromised and whether justice is being done.

II. Purpose and Approach

This study examines the issues surrounding criminal prosecution in the United States and places them in larger historical and comparative perspectives. It shows that changes in prosecution arrangements here and abroad are part of a trend towards increasing rationality in the organization of prosecution, a trend which reflects the rationalizing forces in other spheres of modern society that have been driven by the modern capitalist economy. It is part of the transition to the latest stage in the historical development of prosecution systems, one in which the decision to prosecute has become most fully socialized.

In this stage that decision is no longer determined primarily by the individual's desire for personal vengeance or by the public demand that justice be done in every case where a crime has been committed. Of course, such demands and expectations continue to exist and lie behind the perennial popular dissatisfaction with the administration of justice. Indeed such demands have increased dramatically with the bureaucratization of the machinery of law enforcement and the concomitant growth in the ideology of crime prevention.

Modern police forces have become a formidable engine for stimulating the demand for criminal justice resources. Unlike earlier times when enforcing the law was left to private initiative or civic duty, law is now enforced by a full time bureaucracy that has come to judge and justify itself in terms of its productivity in making arrests. Moreover, they represent a powerful special interest in seeing that arrested cases are fully prosecuted.

In solving the historical problem of the underenforcement of law the modern police have become one of the driving forces behind its overenforcement. This has produced a quantum leap in demand for justice resources. Modern societies have the resources necessary to give every criminal case a full and complete legal determination of guilt if that were their highest priority; but it is not. Thus for the foreseeable future priorities among criminal cases will be set and means will be developed to dispose of cases through shortcircuits.

The decision to prosecute is no longer a mere technical matter of determining that the threshold level of required legal proof exists. Rather, it represents a crucial policy choice about committing limited justice resources to particular classes of events. It is where the link between the individual and the collective interest in the enforcement of law is coordinated. It is the point where the mix and volume of cases to be given formal treatment is initially set.

The emergence of the system-managing, policymaking role of the modern public prosecutor has not occurred everywhere at the same time. It has developed most fully in the United States. In continental systems it has been suppressed.

This study of criminal prosecution attempts to place the discussions of developments in the American office of the public prosecutor as well as various policy initiatives of limited scope into a much broad historical and comparative context. It is hoped that such a perspective will provide a clearer understanding of the value choices that are being made, the interests that are being served and the forces that are at work.

The study attempts to integrate the available literature into a coherent whole. The unit of analysis is not the public prosecutor's office per se but the prosecution function and the ways in which societies have institutionalized that function. This includes the work of public prosecutors's offices but may also include the actions of private individuals, the police, the courts, grand juries or others.

Facts do not speak for themselves. They have meaning only when ordered by some orienting framework. But, given the inchoate and conflicted status of theory development in criminology and the social sciences today, and the multiple levels of analysis and broad scope of our topic, the choice of a framework is not easy for anyone but the dogmatic.

It often happens that the same facts can be interpreted with equal plausibility from alternative theoretical frameworks; and it also happens that differences in levels of analysis usually call for different types of frameworks. Arguments about which framework or level of analysis is the "correct" one can be misleading. They may appear to be arguments about the validity of alternative scientific theories, when in fact, as Kuhn has shown, they are often ideologically-tinged meta-scientific differences about underlying assumptions and images, or, in his terms, "paradigms".[41] This is especially true in the social sciences where multiple paradigms coexist.

This point has been amply developed in the criminological literature in the course of the "consensus-conflict" and the "micro-macro" debates of the past two decades. One upshot of those debates has been a call for more robust theories capable of reconciling the differences in levels and perspective--something that has yet to happen.[42] Another has been a return to the grand theorists of the last century, such as Durkheim, Marx and Weber, in search of fresh leads.[43] A third has been kind of theoretical agnosticism and a search for patterns in data to be explained theoretically later, if at all.[44]

It is not our purpose to try to solve the riddle of developing an adequate social theory. Our primary orientation comes from the work of Max Weber. His study of the evolution of law and society[45]; his view of rationalization as a cultural force coming to dominate one sector of society after another[46]; and his analyses of the underlying dimensions of legal decisionmaking as well as the nature of bureaucracy[47] provide a rich source of insights into the forces shaping the development and operation of prosecution systems.

Endnotes

1. National Advisory Commission, 1973.

2. Royal Commission on Criminal Procedure, 1981.

3. Herrmann, 1978.

4. Codice di Procedura Penale, Law N. 447, September 22, 1988.

5. Council of Europe, 1988.

6. McDonald, 1985.

7. The French and Prussian histories differ in that each country had full-time salaried police officials and France had had a public prosecutor much earlier than the nineteenth century. Nevertheless, their traditional systems of law enforcement had also relied upon private initiative and self-help as important supplements (for further details see infra).

8. Williams, 1979.

9. Weber, 1954: 349.

10. Henrico County (Va.) County Clerk's Office records, April 2, 1695. Cited in Scott, 1930: 68.

11. Cockburn, 1977; Samaha, 1974; Tobias, 1979; Beattie, 1986; Gatrell et al., 1980; Ferdinand, 1984.

12. See e.g., Private Security Advisory Council, 1977; National Advisory Committee, 1976.

13. Dawson, 1914.

14. Federalist Papers #10.

15. Goebel and Naughton, 1944.

16. Ottoway, 1991095; Murphy, 1990.

17. See generally, Rossides, 1990.

18. McDonald, 1976.

19. Thomason, 1981; Anderson, 1976; Herrmann, 1978; Jescheck, 1970.

20. Calhoun, 1927: 5.

21. Dawson, 1960.

22. The contemporary victim's rights movement in Anglo-American countries is attempting to establish certain rights for victims. But, even these limited rights do not alter the state's sole claim to determine the disposition of criminal cases.

23. Selznick, 1969: 18.

24. Selznick, 1969: 20.

25. Selznick, 1969: 22.

26. Steinberg, 1984.

27. Emery, 1913.

28. Santobello v. New York, 404 U.S. 257 (1971).

29. Professor Thomas (1969) observed, "There is no doubt that [plea bargaining] plays quite a large part in the day-to-day administration of criminal justice [in England]; yet it is kept from the public eye...."

30. R. v Turner, Criminal Appeal Reports 54 (1970): 352.

31. Du Cann, 1977.

32. England had established an Office of the Director of Public Prosecutions in the late nineteenth century; but, it played a limited advisory role and was not involved in the daily review and preparation of the mass of cases. See Chapter 3.

33. Crown Prosecution Service, 1986.

34. Goldstein and Marcus, 1977. But see Langbein and Weinreb, 1978.

35. "Il Pubblico Minister ho l'obbligo di esercitare l'azione penale." Article 112, Constitution of the Republic of Italy.

36. Merryman, 1985.

37. Beccaria, 1963: 15.

38. Jescheck, 1970; Thomason, 1981; Anderson, 1976; Herrmann, 1978.

39. Law 16, February 1987 N.81. "Delega Legislativa al Governo della Repubblica per L'emazione del nuovo codice di procedura penale," Gazzetta 16-3-1987, p.5.

40. Personal communications to the author from Professore Ernesto Savona of Rome and Dr. Antonio Mura, Magistrato and former member of the Higher Council of the Magistrates, of Livorno.

41. Kuhn, 1970.

42. Taylor et al., 1973.

43. Inveriarity et al., 1983.

44. The research on career criminality is in this genre. One of the leaders this field, Professor Alfred Blumstein, explained at a panel at the Annual Meeting of the American Society of Criminology at San Diego that his work was atheoretical because it is too early to develop theories. More empirical analysis is needed to find patterns which will be the basic material with which theories can be constructed.

45. Weber, 1954.

46. Schluchter, 1981.

47. Weber, 1954.

Chapter 2

THE DEVELOPMENT OF CRIMINAL PROSECUTION I: GREECE, ROME, CHURCH, ANCIENT REGIME AND MODERN INQUISITORIAL SYSTEMS

The following two chapters provide some historical detail upon which the general conclusions presented in Chapter 4 regarding the prosecution function are based. These chapters assemble in one place a series of vignettes of the solutions to the policy issues related to criminal prosecution that societies have developed in different times and under different political, social and economic conditions.

I. Ancient Greece

A. Solon's Reforms

The decisive step in the emergence of true criminal law in ancient Greece is generally regarded as having occurred at the beginning of the sixth century B.C. At that time, Solon was appointed as "mediator and archon" by agreement of contending political parties. His mandate was to enact reforms that would resolve a long-standing strife between the upper and the lower classes. The popular control of the prosecutorial and judicial powers which he established laid the foundation for democracy.

In addition to providing for appeal from the decisions of magistrates and establishing law courts in which all male citizens were eligible to participate as jurors, he took the revolutionary step of extending the right to initiate criminal prosecutions to all citizens. Now any citizen could lodge a criminal charge when anybody--whether free or slave, whether man, woman, or child--had been wronged by an unlawful action. "Anybody's wrong was everybody's business".[1] The state, and with its help, the individual citizen assumed the responsibility for prosecuting matters that formerly had been the prerogative of the family or the aristocratic council.

Solon socialized private wrongs in order to protect the lower class from the aggression of the rich and powerful; and to avoid possible revolution. He described his purpose in creating the role of the voluntary public prosecutor as follows: "For the greater security of the weak commons [I] gave a general liberty of indicting for an act of injury,...intending by this to accustom the citizens like members of the same body to resent and be sensible of one another's injuries."[2] Elsewhere he stated, "That city is best in which those who are not wronged are as zealous in prosecuting and punishing wrongdoers as those who are wronged."[3]

Solon's appointment came at the height of a political crisis. The demand for the redistribution of land and cancellation of debts could no longer be blocked off by the landholding oligarchy through force or minor concessions. Solon belonged to a clan of the highest nobility but was a man of moderate means. As a younger son he had not inherited the ancestral estate and was engaged in trade. Solon had induced the Athenians to make him their political mediator through his public speeches in the agora. Using poetry rather than mere prose he spoke with deep religious fervor for the fate of Athens. His elegy called Eunomia warned that the state was threatened by the people themselves, especially by the unjust aims of the leaders and the rich. "Bad order (dysnomia) brings evil to the polis, while "good order" (eunomia) saves the state from ruin, "straightens crooked judgments," and "stops the works of factional strife."[4]

At the time all functions of government had long been exclusively in the hands of the eupatrids, an hereditary class of Athenian aristocrats, who acted through the aristocratic council of Areopagus. The inferior order of citizens, the peasant farmers (the georgi), and the artisans (the demiurgi), could only take part in government by attaching themselves to a member of the aristocracy. Below this was the lowest class of freemen, the propertyless population (variously named thetes, hectemori, and pelatae), whose members had even fewer rights. At the bottom were the slaves without any rights.[5]

Economic conditions in Attica were creating a polarization of class interests. Population increase, poor soil conditions, and a long war with Megara had benefitted the large farmer and forced the peasant farmer and artisan into debt. Since money had replaced the practice of barter, the poor farmer was forced to mortgage his property to get loans. These mortgages were being constantly foreclosed. More and more of the agricultural region of Attica was passing into the hands of a few enormously wealthy men.

Similarly, the urban artisans were squeezed by competition from more efficient industrial establishments. They were forced into being hired laborers or slaves. Many members of these middle classes had sold themselves or the children into slavery or had fled the country.[6] The danger of a revolt and possible tyranny was so great that the rich must have regarded any alternative to such a disaster as preferable. They undoubtedly played the decisive part in electing Solon who had the confidence of the lower classes, had spoken the bitter truth but who had no radical views.[7]

Solon cancelled all debts, brought home the Athenians who had been sold as slaves or had fled, and restored to liberty those who had been reduced to servitude at home. These measures were designed to heal the body politic and restore the victims of economic pressure to their former status. But, they were only

temporary expedients. They might easily have been undone because they were not accompanied by any general redistribution of land or wealth. Thus, these restored citizens were still abjectly weak and powerless both individually and collectively.[8]

To prevent the re-degradation of these inferior classes Solon redistributed social power. The keys to this were the extension of the right to prosecute to all citizens regardless of whether they were the victim of the crime, and the establishment of the right of appeal from the judgments of the aristocratic magistrates to the newly created people's courts.

Solon had prohibited the seizure of a person for debt and also the sale of a child by a parent or of a sister by a brother. But under the existing machinery of justice those prohibitions would have been ineffective. If the individual victim or his family were to be the sole avenger of his wrong as the traditional law of tort had provided, there was little chance that these new laws would have been enforced. A child would have had to prosecute its parents. An adult Athenian seized as a slave by his creditor would have had little likelihood of successful recourse to the courts. Thus, to consolidate his abolition of debt bondage, Solon socialized the right to prosecute.[9]

B. Pre-Solonian Prosecution

Before Solon the Greek methods of redressing wrongdoing had evolved from the ancient principle of private self-help to increasingly formalized methods of community control of private disputes culminating in the criminal trial. In the Heroic Age the conception of crime as a wrong which was a menace to society had not been formulated. The commonest method of obtaining redress was self-help upon which there were no restrictions.

It was the duty of the father to avenge the wrongs of those who were under his protection including the servants. Adultery, seduction, or rape were punished by the husband or nearest relative in the case of a free woman, by the master in the case of a slave. Cattle rustling and piracy were very common and were only responded to by the community as a whole if large-scale cattle theft was involved. Otherwise the owner had to catch the thief in the act and risked being killed in trying to recover his property. When redress was sought the injured party included not just a claim for the stolen or damaged property but also substantial damages.[10]

Homicide was also avenged by self-help. Outside of the circle of the dead man's kinsmen and friends, there was no popular sentiment against ordinary homicide. Several murderers are mentioned in the literature as living as honored members of the communities to which they fled as exiles. However, the slaying of parents was met with universal condemnation as was a wife who compassed the death of her husband.[11]

The idea that murder is a menace to society is modern; in Homer it was regarded as solely the concern of the relatives. Public sentiment not only tolerated blood-feuds but even demanded that men should avenge the death of their kinsmen. When men of rank were involved in a homicide, the resulting feud might involve so many people as to amount to civil war. Homicide among relatives was usually settled by banishment. The question of the right to exact vengeance arose only in cases involving the acceptance of blood-money. Such an agreement could only be made with someone who could give a reasonable guaranty that the slayer would not be harmed.[12]

A common method of bringing a dispute to an issue was by means of a wager. The wager took various forms: challenge to a battle or trial by evidentiary oath. When charged with theft, for example, one could escape responsibility by taking an oath. In cases not involving violence, the system of challenge and wager had by the time of Homer come to be used to induce a reluctant opponent to submit to arbitration.[13] The Greeks evinced from the very first a preference for rational discussion as a means of settling disputes. Thus, ordeals, oaths and other mechanisms of invoking divine judgement soon lost their original significance.[14]

With regard to the emergence of public control (via judicial process) of the redress of homicide and other violent offenses there has been much controversy. The general view is that already in prehistoric times there had been a trend towards waiving the blood-feud and submitting the quarrel to arbitration, and that later the growth of state power and possibly the changing attitude to the unrestricted continuance of the vendetta made it obligatory to postpone self-help by individual or family until a court had passed judgement on the facts. In this view there were three stages: voluntary arbitration, compulsory arbitration and judicial decision.[15]

But this picture of a linear evolution from private arbitration to public trial ignores some facts. As far back as the voluntary acceptance of arbitrators and co-existing with that institution, there also was in some Greek communities some authority with sufficient power to compel the submission of certain disputes to judicial (and not just arbitral) decision. In these societies with some sort of crystallizing central authority there existed a compulsory and truly judicial process of hearing and determining the question at issue.

At first this amounted to no more than an order to postpone the recourse to vengeance until it could be established that the right to vendetta existed in the particular case. In the time of Homer this stage of judicial development had already been reached in some communities, assuming Jones' interpretation of the scene depicted on the shield of Achilles in the Iliad is correct. What

is being decided there is not whether the dead man's kinsman must accept blood-money if offered, but whether the defendant has in fact paid the sum he had already agreed with the kin to pay.

This suggests that while the community had not yet reached the stage at which it could thwart the blood-feud by forcing a pecuniary settlement, it was advanced enough to be able to force the vengeful party to recognize that the right to vengeance was temporarily suspended.[16] Now checks on unrestrained retaliation could be interposed. The truth of the accusation could be established; whether the blood-money had already been paid could be contested; or, a determination could be made as to whether the offender was even bound to pay blood money.

The last question arose from the fact that exceptions to the right of vendetta undoubtedly existed. In certain situations such as self-defense or catching an adulterer or robber in flagrante delicto, primitive society undoubtedly recognized the right of the victim to act, and probably to slay the offender. It is also likely that this fundamental principle of self-defense occasionally conflicted with the equally fundamental principle of the blood-feud. There must have been cases where kinsmen sought blood money and offenders challenged their right on the grounds that their actions were justifiable. At some point customs were developed to resolve this ambiguity as to when the life of an offender might be taken without retaliation. Older Attic legal provisions relating to justifiable homicide appear to be the outgrowth of this ancient exception. They provided that the nighttime housebreaker, the robber, the adulterer caught in flagrante delict where a man slays the adulterer or the robber discovered in flagrante delicto or in self-defense, could be slain with impunity.

Popular sentiment against wrongdoers which resulted in community action did occur in the Homeric age. This happened in cases where the acts committed by the wrongdoers affected the whole community alike. One common example of this was the offender who, by preying upon a neighboring people, exposed his fellow-citizens to the danger of responsibility for damages or to reprisals. Such a person might be lynched and his property confiscated.[17]

Also long before Solon the state seems to have developed several special forms of criminal accusation for dealing with certain offenses. Eisangelia was a denunciation or information laid before the Areopagus by members of the council or other individuals. It dealt with grave offenses against the state. Menysis was a procedure whereby the council or assembly could receive informations regarding grave offenses from slaves or aliens who ordinarily were not entitled to initiate prosecutions. With the reforms of Solon, the graphe became the most common form of public action; but these other forms continued to be used.[18]

C. Post-Solonian Prosecution

During the fifth century B.C. public advocates were occasionally elected to conduct certain prosecutions for wrongs directly affecting the public security or public interests, such as treason, plotting to overthrow the democracy, and accepting bribes. The practice seems to have disappeared in the fourth century. In the absence of any permanent public prosecutor, the administration of justice ultimately rested on the initiative of private individuals. But, Solon's dream of justice and good order being preserved by public-spirited citizens disinterestedly pursuing wrongs done to their fellow citizens was only partially realized.[19]

Athenians did develop high ideals of citizenship and criticized those who failed to take their share of public responsibility including prosecuting wrong-doers. There apparently was no lack of prosecutors. The general right to bring public prosecutions regardless of whether one was an injured party came to be regarded as a cornerstone of democracy. But, by the middle of the fifth century serious abuses had also developed.

In order to encourage certain types of prosecutions, inducements were given including a liberal share of fines, confiscations, and moneys recovered for the treasury.[20] These and other prosecution-related sources of profits produced a class of men who made a profession of prosecution for financial gain, the sycophants. These unscrupulous perjurers and blackmailers extorted money from innocent people under the threat of prosecution or falsely accused them if they resisted;and they sold their new rhetorical skills to unprincipled politicians.[21]

Political incentives also drove prosecutions. The democratic structure of the government ruled out political parties in our sense. The people itself meeting in the assembly or the courts made decisions. Individual political leaders held no official position or party following. They had to earn their influence by the success of the advice they gave as occasions arose and by their dedication to the public interest.

Young men with political ambitions advanced their political fortunes by prosecuting officials at their audits, and politicians for bribery, corruption, misappropriation of public funds and other crimes. The use of prosecutions to discredit or destroy political enemies became commonplace. Aristophon, a politician of the early fourth century, was acquitted seventy-five times on indictments for illegal legislation. Many of these charges had been brought by sycophants.[22]

The abuses of the sycophants were well-recognized and condemned by the Athenians. The more general problem of bringing false accusations had been condemned as early as Solon who regarded the practice as deserving more severe punishment than any other

wrong. Efforts were made to check the improper use of the legal process by penalties for prosecutors who failed to obtain one-fifth of the total jury votes or dropped a prosecution after starting it. But these safeguards were clearly ineffective. The popular belief that freedom to prosecute was one of the bulwarks of democracy was an insurmountable obstacle to effective reform. A clear line could not be drawn between the genuine champion of the public interest and that "happy compound of the common barrator, informer, pettifogger, busybody, rogue, liar, and slanderer"[23] which made up the Athenian sycophant.[24]

The modern practices of charge dismissal and plea negotiation were not routine but neither were they unknown. Although the penalties for dropping prosecutions were designed to prevent false accusations, it naturally had the effect of discouraging these practices. The prosecutor who decided to accept some settlement from the defendant was in theory subject to a 1,000 drachma fine and the loss of the right to prosecute similar suits in the future. But these penalties were not always enforced. There were exceptions.[25] More importantly, they were evaded with impunity in one fashion or another. This was especially easy when collusion between the two parties was involved. Thus, settlements could be negotiated even for financial considerations. The main objection to these was likely to be raised by defendants in subsequent suits by the same prosecutor. The defendants would try to show that the prosecutor made a business of taking bribes to buy off prosecutions.[26]

II. The Roman Systems: From Accusatorial To Inquisitorial

Roman criminal procedure is of special interest because of its double development and historical impact. The Rome of the Republic first gives us an accusatory system which is later transformed by the emperors into an inquisitorial one. In turn, the inquisitorial procedures of imperial Rome are adopted and preserved by the Church as the basis for its Canon criminal procedure. Then, with the revival of legal studies in the eleventh century in Bologna, this procedure is taught as the procedure of the Holy Roman Empire and hundreds of legal experts come to advocate its use.

Eventually it replaces the accusatorial systems of the Germanic tribes, the Italian city states and the French and German courts. It becomes the basis for the infamous Spanish and Papal "inquisitions" as well as the normal machinery of criminal justice of the ancient regime. Later it is the target of the attacks of Enlightenment critics such as Montesquieu, Voltaire, and Beccaria. In the wake of the French Revolution it is tamed and modified but not replaced. In the twentieth century it is approved by the authoritarian governments of Nazi Germany and fascist Italy. But, it continued to have its critics. As of October 1, 1989 its main features were abolished in Italy, the country that gave it birth.

A. The Accusatorial System

In Roman history several events mark the progress from private wrong to public crime. By the time of the Twelve Tables in the fifth century B.C. the transition was underway. Although the law of the Twelve Tables rested on the customary practice of private vengeance, two significant innovations had occurred. At some point the state came to intervene in a minimal way into that system.

Custom had provided two courses of action: either blood feud or composition. The injured party supported by his kin could either take revenge or might be pacified by the offer of some compensation from the person who had wronged him. But now a magistrate interposed between the contending parties as a mediator. His function however was only ancillary to self-help. Mommsen says that "on the one hand he settle[d]...the question of fact; on the other hand, when a wrong ha[d] been proved, he either g[ave] self-help its course, or else enjoin[ed] the injured party to renounce it on consideration of receiving compensation".[27]

The second innovation is that certain acts which were primarily offenses against individuals had come to be regarded as so dangerous to the public that the community involved itself in their punishment. These included murder of a freeman, arson, the theft of growing corn, and witchcraft. Mommsen reports that by that time "[a]ll these are treated as public crimes and every trace of a co-operation of the person immediately injured or his gentiles thereby disappears".[28]

As Rome grew from a rural community to a powerful city state the "private" criminal law of the Twelve Tables proved increasingly inadequate. The large Roman metropolis was dominated by powerful social tensions. The growth of the urban proletariat and of the slave population was undoubtedly accompanied by an increase in criminality which required vigorous measures for the maintenance of public security.

In the year 149 B.C. a third innovation occurs which Maine regards as the advent of "true criminal law". The quaestiones perpetuae are established. These are permanent commissions with the authority to punish crimes. They were composed of a presiding magistrate, the praetor, and a panel of from 32 to 75 jurymen.[29] They replaced the temporary commissions which had gradually evolved from the earlier days when the comitia began delegating its powers to punish offenders to quaestores or commissioners.[30]

At first the special commissions had been appointed to investigate particular accusations and, if proven, to punish the offenders. Eventually they were given temporary jurisdiction over crimes that might be committed. Finally, the permanent commissions were established. They were given jurisdiction over expressly

named crimes and were authorized to try and sentence all persons whose actions in the future fell within the definitions of the particular crimes addressed by the specific commission. In addition, there often existed quaestiones extraordinariae which were special commissions that dealt with matters for which no quaestione perpetua yet existed. Along with these standing criminal courts, popular courts in which the entire people passed judgement continued to exist.[31]

The criminal procedure of the Republic was accusatorial; and it seems to have been largely based on private prosecutions.[32] A formal accusation had to be made before a prosecution could occur in the sense that the issue was regarded as being between the accused and the accuser, who was responsible for furnishing the evidence necessary for his case. Any citizen could bring an accusation before the quaestiones. Citizens seeking to bring accusations before the popular courts were obliged to go through certain magistrates who alone could bring charges there.[33]

Most of the participants in the legal procedures of the Republic--plaintiffs, defendants, judges and members of the quaestiones perpetuae--belonged to the middle and upper strata of Roman society. There is less known about the criminal procedures among the least powerful and worst-positioned members of Roman society. Although some evidence suggests that for them procedure was much more summary[34], Jones contests this. He reports that the only difference between the lot of the upper and lower class offenders was that the latter were frequently, perhaps regularly, imprisoned before trial and actually executed after it.[35]

The problem of false and malicious prosecutions was dealt with by penalties. There were also penalties designed to protect the interest of the State against the corrupt withdrawal of an accusation through collusion or some partiality towards the accused.[36] As in Greece, the latter would naturally have tended to discourage plea bargaining. Their mere existence suggests that some honest plea bargaining probably occurred. But, one can readily see that in a system of private prosecution the inclination to settle disputes through negotiation would be a strong internal force towards corruption. Monetary settlements invite exploitation.

Malicious prosecution constituted the crime of calumnia; and collusion on the part of the prosecutor was praevaricatio. Penalties for these offenses were available through private suits for damages of four times the amount originally sued for; and through public suits in infamia resulting in the loss of significant civic rights including exclusion from public office, from appearing as accuser (except in case of wrong to himself), and voting rights.[37]

Later, during the Empire, additional punishments were

inflicted extra ordinem. The calumniator was punished in proportion to the evil he had tried to cause his innocent victim. The praevaricator bore the punishment that would have been inflicted on the person he helped escape. The lex talionis governing these penalties was not legally acknowledged until Constantine, the first Christian emperor. He probably extended to the false accuser the punishment threatened in the Mosaic Law against the false witness.[3839]

Under the Empire's inquisitorial system of prosecution, the old accusatorial system continued to exist. But the provisions to discourage false accusation and collusion became so onerous that they probably discouraged accusers from coming forward. The private prosecutor had to sign the inscriptio, the essential part of the formal accusation. This made him liable to the penalties for false accusation. The accuser sometimes was subject to the same form of detention as the accused. In trials for majestas (treason) the prosecutor who failed to sustain the charge could be tortured.[40] No doubt these provisions fed the growth of the Roman inquisitorial system as similar laws fed the medieval French system.[41] It was safer for the private citizen to act as informer and to allow the judge to conduct the inquiry and make the charge.

Criminal procedure during the Republic was separated into a preliminary investigation and a trial. The accuser would first request of the presiding officer (the inquisitor) of the inquisitio permission to bring an accusation against some certain person. The presiding officer thereupon reviewed the facts submitted by the accuser and either granted permission or refused. If permitted, the accuser then made a formal accusation stating the nature of the act and naming the person charged.[4243]

Trial procedure was balanced in favor of the accused. The trial was public and oral; and the defendant could be represented by counsel. The trial could not begin without the presence of the accuser who had to conduct the prosecution himself. It seems that he could not be represented by counsel ("procurator").[44] The presiding magistrate did not participate in the examination of the accused.

B. The Inquisitorial System

With the transformation of the Roman Republic into the Roman Empire during the reign of Augustus (31 B.C.--14 A.D.), an enormous number of powers came into the hands of the emperor. He and his servants assumed more and more direct control of legal procedure, at first paralleling existing courts and procedures, but eventually superseding them. Gradually the sources of law were narrowed down to one--the edict of the emperor. Gradually, also a new inquisitorial procedure displaced the old popular courts and the quaestiones perpetuae.

Under Augustus the state assumed a proactive attitude toward crime. There appeared three entirely new criminal courts, that of the emperor himself, that of the consuls presiding in the senate, and that of the prefects (of the city and of the provinces). The duty of the prefect of the city was, according to Tacitus, to discipline slaves and turbulent citizens.[45] Most of the jurisdiction formerly exercised by the popular courts went to the prefect of the city, who by the end of the second century had jurisdiction over all crimes committed in Rome or within a hundred miles of the city.[46]

In the provinces the governors were given judicial power and were directed to use it aggressively. Their imperial mandate contained the clause: "the man in charge of a province must see to it that he clears the province of criminals."[47] Ulpian expanded this: "it is the duty of a good and conscientious governor to see to it that the province he rules is peaceful and tranquil, and this result he will achieve without difficulty if he take careful measures to ensure that the province is free from criminals and searches them out. He should search out persons guilty of sacrilege, brigands, kidnappers and thieves and punish them according to their offenses."[48]

In Rome and the provinces special new officials, police (irenarchae[49] and vigili) and "prosecutors" (advocatus fisci),[50] were created to discover crime, apprehend dangerous offenders, and bring them to trial. When an irenarch caught a brigand he was expected to interrogate him and his accomplices, and to file a report (elogium) with the governor. At court the irenarch served as the accuser and had to substantiate his case. He was reprimanded if he failed and punished if he had falsified evidence. Alternatively, government officials could report criminals by what was called a notoria. That is, the person's criminality was notorious. In such cases the trial would be conducted without a formal inscriptio by an accuser (though even then the informer had to appear to sustain his accusation).[51]

Alongside of and often in opposition to the inefficient accusatorial institutions of the private accuser, inquisitio, formal accusation, and jury trial, a new more efficient, inquisitorial procedure emerged. Under the new procedure, known as cognitio extra ordinem, or extraordinaria, the magistrate's powers were greatly expanded. By virtue of the delegation of imperial authority, a magistrate proceeding under cognitio extraordinaria could institute proceedings on his own initiative or after information from an informer. The new police and prosecution officials worked under his supervision and reflect his expanded responsibility to inquire (inquirere) into the existence of crimes and the identities of perpetrators.

In spite of its name the new procedure quickly became the ordinary procedure of criminal law. By the second century A.D. the

older meaning of the term, inquisitio, the accuser's search for the facts, gave way before the new inquisitio of the magistrate and his subordinates. He bore the burden of developing the facts and determining the truth. The trial itself, as well as the preliminary investigation, orginally conducted chiefly by the accuser, came to be conducted entirely by the magistrate. The silent magistrate who once presided over the jury trials of the Republic was replaced by a magistrate who was instructed "to ask frequent questions to ascertain if there is anything behind", and "to search out everything, and by full inquisition to bring out clearly the array of facts."[53]

During this same period of profound procedural change in Roman law torture as a means of interrogation began to expand upward through Roman society. Formerly only permitted in the case of slaves, torture could be applied to free citizens in cases of treason, and from the third century on more and more crimes and more and more sorts of people were made routinely subject to it.[54]

By the early fourth century, Roman inquisitorial procedure was fully developed and routinized. It differed greatly from the institutions and judicial theory of Republican Rome. It placed in the hands of a single public official the entire process of criminal prosecution from investigation to accusation to conviction. That official had greatly increased powers and responsibilities. He had the obligation of finding out the truth in criminal matters. He had at his disposal a system of police and informers; the authority to initiate investigations and charges; and right to use torture to extract confessions.

This was the character of Roman law when the Empire converted to Christianity in the fourth century.[55] It is the law that the Christian emperors used against heretics. It shaped canon law and procedures. It was preserved in the fifth and sixth century codes of Theodosius and Justinian, rediscovered in the eleventh century by the legal scholars at Bologna; revitalized by the Church in the early thirteenth century; and shaped the inquisitorial systems of France and Germany enacted in the sixteenth century.

III. Early Germanic Procedure: Return to Private Accusation

The Roman Empire ceased to exist in the West after the fifth century. It was succeeded by Germanic kingdoms, states which used political authority far differently, and exercised it upon a different population. Roman inquisitorial procedure disappeared for several centuries (although it survived as the internal doctrine of the Church).

Once again, accusatorial procedure prevailed. To charge anyone with any offense, public or private, an accuser was required. Crime was treated as a private injury. There was no

distinction between criminal and civil proceedings. A summons was served on the accused stating the complaint against him and ordering him to appear before the court at its next session.[56]

The tribunal to which the dispute was submitted was a popular assembly to which all freemen had the right and duty to attend. Proceedings were oral in the presence of all those attending the court and were very formalistic. The accuser in making his complaint was bound to a strict formula; and the accused's response also had to follow a formula. Both could be assisted by counsel in order to avoid errors, which were fatal. If the defendant denied the charge, the judicial assembly or "judgment finders" handed down their judgement. But they did not decide the factual question of guilt or innocence. They merely indicated who could be considered to be prima facie right in his assertions. That party was then permitted to confirm his statements by oath or ordeal.[57]

In accusations for less serious crimes the individual could clear himself by his own oath whereby he pledged his salvation on his innocence. For the more serious cases, the individual oath had to be strengthened by that of compurgators ("oath-helpers" who also pledged their salvation). In some extraordinary cases (slaves, persons of ill repute, persons unable to obtain the necessary compurgators, and for certain serious crimes, such as poisoning) the court would appeal to God to provide some sign of the accused person's guilt or innocence.

The most common way of doing this was to subject the accused to an ordeal which he could undergo successfully only with divine protection. Many different ordeals were used. He might be made to carry a hot iron a certain distance and days later show that God had miraculously healed the seared flesh; or, he would have to put him arm into hot water and in a similar fashion later show that his limb had healed; or he might be thrown into a body of water and would be considered innocent only if he sank to the bottom.[58]

In the cases involving free men and serious crimes punishable by death or mutilation, an alternative to the ordeal was available. The accused or his champion might be asked to engage in a judicial duel with the accuser or his champion. If the defendant failed in the ordeal or was beaten in the duel, the penalties fixed by law for his offense would then be inflicted. On the other hand, if he survived the ordeal or won the duel, then the complainant would be subjected to an ordeal or required to pay a fine to the public authority.[59] (Survival of the ordeals was made possible by various ruses, for example, proper breathing techniques or calloused hands.)

In addition to the oaths, ordeals and duels, a form of plea bargaining existed among the Franks. It was a well-settled custom that a person condemned by the court to undergo the ordeal could

through negotiations with the aggrieved party purchase the privilege of clearing himself by canonical purgation, a less severe disposition. He would be bound to pay his accuser only a portion of the fine which he would incur if proved guilty. The portion varied with different offenses from one-fourth to one-sixth of the wer-gild.[60]

IV. The Reemergence of Inquisitorial Forms on the Continent

Public prosecution using inquisitorial procedures in which the authorities (royal, feudal and ecclesiastical) took the initiative and no longer waited for an injured private party to make an accusation reemerged as regular procedure in the thirteenth century. This profound change in legal procedure was built upon legal innovations initiated in the ninth century by the Franks and adopted and further developed by the Church. It was accompanied in the thirteenth century by the thorough transformation of the law of evidence. Oaths, ordeals and trial by battle were replaced by the highly rationalistic law of proofs by which items of evidence were given specific probative weights and guilt could be determined by adding them up as if adding an accountant's ledger.[61]

These changes came about as the result of pressures operating from both within and without. Internally, the Germanic system had the usual inefficiencies of a private accusatorial system. The principles upon which it was based left gaps in its net of control. These were destined to increase with the growth of cities, international commerce, and the state-building efforts of monarchs, ecclesiastics and independent cities.

Enforcement depended upon private initiative. Successful prosecution depended upon either luck or subterfuge if ordeals were involved; military prowess or the money to hire a champion if trial by battle was involved; or, a well-established reputation for honesty if oaths were involved. Widows, orphans, foreigners, persons with bad reputations as well as peasants, merchants, artisans and others unskilled in the art of armed combat were disadvantaged by this system. The danger of being subjected to an equal punishment if your prosecution failed to get a conviction represented a major disincentive. Also, the system responded only to acts, not to beliefs or lifestyles. Thus it was ill-adapted to controlling the problems of heresy, sedition or vagrant or immoral lifestyles. Finally, vendetta-based systems are incompatible with urban life. Blood feuds between powerful groups and their allies can destroy urban life and the abundance which its economy can provide.[62]

The external changes that promoted the re-emergence of inquisitorial procedures were part of the larger movement toward rational management in secular and church administration, and in finance and economic policy beginning in the ninth century and accelerated in the late eleventh and twelfth centuries by the rapid

growth of cities, markets, long-distance trade and commerce based on rational calculation of profits.

A. Developments in Secular Law

The procedures that were destined to become the basis for the inquisitorial system began as means for the rational management of the Frankish state. Two procedures were important: the right of the King to make inquests (the inquisitio, to proceed per inquisitionem) and the process known as the Rugeverfahren.[63] When the Carolingian kings needed information for governmental affairs or to settle their financial disputes with local landowners and churches, they summoned committees of neighbors who were questioned under oath on the matters in dispute. This procedure was subsequently introduced into criminal cases. Churches and monasteries also obtained the privilege of employing it.[64]

The Rugeverfahren was a kind of presentment jury. These judicial assemblies were convened by royal servants called the missi ("those sent"). They designated the most trustworthy men of the jurisdiction to inform upon the crimes known to them personally where no accuser had appeared. The procedure was confined to serious offenses.[65] In addition to its proactive nature, another notable advantage of this procedure is that the accusers were protected from the customary possibility of a challenge to a judicial duel. The accused could clear himself only by oath or ordeal.

After the Frankish empire broke up, the Norman dukes retained most of the Frankish judicial and administrative institutions. Out of the Rugeverfahren they developed the enqueste du pais ("inquest by the country"), an investigatory procedure which could be used against the accused if he consented. It was a kind of proof by witnesses used in cases of arrests on suspicion. The ducal judicial officer went to the place where the offense was committed and summoned up to twenty-four unbiased citizens who had knowledge of the facts. They were questioned under oath, confronted by the accused, and heard their depositions read to the accused. Then on the basis of these statements the judicial officer handed down a judgment after consulting with four knights. The consent of the accused to this procedure was exacted by strong measures.

In England this institution emerged as the "grand jury" after being imported via the Norman invasion. But on the continent it was mingled with a fictionalized mixture of the doctrines of in flagrante delicto and mala fama (ill-fame) and became part of the judicial basis for the new inquisitorial procedure, the aprise or official inquest, which made its appearance in secular jurisdictions in the thirteenth century.

It had long been possible to try and summarily punish an individual caught in the act of committing certain serious crimes.

No formal accusation by a private complainant was necessary. The offender could be punished solely on the testimony of those who had seen him commit the crime. The judge heard the testimony and pronounced sentence. By the 1200s the concept of flagrance was extended to cover an entirely different type of case. If an offense was publicly notorious, and if it was sworn to by a number of witnesses, it could be treated as if the accused had been caught in flagrante delicto. The judge could of his own accord hear the witnesses and pronounce punishment without a formal accusation.[67] Soon the requirement of several witnesses disappeared. The judge could proceed on the denunciation of a single complainant or on his own initiative where crime was notorious.[67]

By the fourteenth century there were four ways in which a judge could take cognizance of a crime: by accusation of formal party; by denunciation; by "present misdeed" (capture in the act); and by "common report" ("arrest on suspicion" --meaning that it was commonly believed that a particular person had committed serious crimes). Prosecution by formal accusation quickly disappeared partly because of the risks to the accuser of this procedure: being held in jail, the threat of trial by battle as well as severe punishment in the case of failed or calumnious accusation. But also there had developed a less burdensome and more rewarding method, the denunciation.

The injured party could denounce the offender to the judge and offer to produce witnesses. The judge first considered whether the denunciation was credible; then conducted the "information" (the preliminary inquiry into the facts); and then, if warranted, had the accused brought to court and conducted the official inquest. The denunciator was really an accuser who stayed in the background leaving the chief part to the judge acting in his official capacity.

Significantly, the denunciator was not subject to the lex talionis for unsuccessful or withdrawn prosecutions, nor held in jail during the procedures. Moreover, the denunciator came to have a private monetary interest in the case. Out of the denunciator developed a new institution, the partie civile. The injured party was allowed to act in a civil suit for the purpose of obtaining reparations. This could be done without bringing the criminal action. The denunicator would state that he was only seeking civil reparation.

Denunciation was used frequently. It could result in the accused being imprisoned pending the outcome of inquest. It was associated with a familiar contemporary phenomenon, the dropped prosecution. If the denunciator subsequently declared that he demanded nothing from the accused, or if he failed to furnish witnesses, or abandoned the case, the accused was acquitted and released from prison.[68] Calumnious denunciation was punished.[69]

Prosecution by denunciation became the legal basis for a new inquisitorial institution, the public prosecutor. This institution also grew out of the administrative activities of government. Although feudal law did not recognize the principle of representation in law courts, the king and the sovereign lords were exceptions to this rule. They had advocates who prosecuted their rights in courts.

The king's procurators and the procurators fiscal of the lords were originally merely business men who could be trusted to act on behalf of the fiscal interests of their employees. But eventually they became real functionaries. The king's procurators are first mentioned in 1302 when Philip the Fair regulates their duties. The description suggests they had been in existence for quite a long time.[70]

The procurators and the fiscals superintended the prosecution of certain offenses involving fines and forfeitures, a major source of revenue of the king and the nobles. They were also particularly useful in addressing a new type of criminal created by the changing social and economic conditions. The growth of cities and long-distance trade had spawned a class of vagabonds and vagrants who wandered about living by begging, gambling, theft and highway-robbery. They could easily evade prosecution by private accusers but not as easily escape the reach of a public prosecutor. The procurators actively pursued them.[71]

The public prosecutor was not considered direct accuser, i.e. party to the process. That would have contradicted the traditional principle that one must have a direct interest before he could accuse. Rather he slipped into the process through an opening developed originally in Canon law and subsequently used by the secular courts to justify the procedure by denunciation. The public prosecutor was considered the denunciator of all crimes. As such he could instigate the judge to conduct an inquisitio; and he could remain a party to the action, producing witnesses and furnishing evidence. It is to the development of this power in Canon law that we now turn.

B. Ecclesiastical Criminal Procedure

The new inquisitorial system of the secular courts was developed first by the ecclesiastical courts and copied in the thirteenth century by secular authorities. The central feature of the new procedure was the official inquest (inquisitio) made by the judge (the aprise, in French secular law). The origins of the official inquest was the right of the Carolvingian king to proceed per inquisitionem. That right had been preserved and developed by ecclesiastical authorities in the exercise of their criminal jurisdiction.

Originally, Canon law had recognized only the accusatory

system in criminal matters. However, in the ninth century it opened an alternative route, the procedure per inquisitionem. If a crime had been committed and a judge established the mala fama of a particular person whom public opinion suspected of the offense, then that person had to expurgate himself either by taking an oath supported by compurgators (purgatio canonica) or by ordeals (purgatio vulgaris). If the accused refused or failed, he could be condemned as convicted of the offense charged against him.

Initially the inquisitio procedure in ecclesiastical affairs had been used almost exclusively among the clergy itself or in matters involving ecclesiastical property or rights. But, the tenth century canonical collection of Regino of Prum indicates that a new form of the procedure had appeared, the inquisitio generalis. Its purpose was not to establish the mala fama of one particular person; rather it was applied to an entire community and used to compel the disclosure in its midst of any persons guilty of offenses. Modeled on the Carolvingian monarchy's jury of denunciation, it was used by bishops in their visitatios (episcopal visitations). It was particularly useful in inspecting and reforming monasteries but was also used among lay communities.

Arriving in a community the bishop, the ecclesiastical judge, convened all the members of the clergy and the faithful. From them he chose seven men of mature age and strait character as juratores synodi and made them swear on holy relics to denounce those whom they knew to be guilty of offenses including not just criminal offenses but violations of Christian morality as well. (Church courts took cognizance of various immoralities which the laws disregarded.)[72]

From this procedure evolved the denunciato, the charge by the judge upon the denunciation of a private individual.[73] This came to be distinguished in a critically important respect from the accusatio. The private individual making the denunciation was not subject to the punishment of retaliation if the denunciation failed to be proven (although calumnious denunciations were punished). Also, the denunciation could be made by the voice of a third person, a procurator.[74]

Out of these new procedures emerged the legal basis for what became the public prosecutor in the secular courts. Doctrinally the denunciator was considered the promovens inquisitionem (the promotor). Eventually, the promotor became a titular official of the ecclesiastical judicature. He was a functionary charged with the duty of denouncing offenses to the judge and promoting inquisitions against culprits.

This ecclesiastical office began with the commissions and temporary delegations by ecclesiastical judges to capable persons to assist them during the course of their inquiries into the criminal and moral state of their communities. At first promotors

were appointed to assist with specific cases. But by the late 1200's at about the same time that the king's procuratores made their appearance, the office of the ecclesiastical promotor became consolidated and distinct. From 1274 Parisian records refer to a procurator episcopi Parisiensis; in 1338 a promotor appears in the Registre de l'officialite' de Cerisy.[75]

The development of the inquisitorial procedure of Canon law was not merely the crystallization of custom but the deliberate innovation of Church authorities intent upon finding more effective means of social control. It was not only the struggle against the heretics but the need to control the scandalous conditions of the clergy that prompted the papacy to find a more strenuous mode of prosecution. In rapid succession beginning in 1198 a series of decretals were issued.

In 1215 Innocent III persuaded the fourth Lateran Council to make several modifications in Church procedure. It firmly established the new inquisitorial procedure and effectively doomed the old modes of proof by ordeal and compurgatory oath. It prohibited their use in Canon procedure and forbade clerics from assisting at secular invocations of divine judgments. Henceforth, the judge had the duty to make a secret investigation of the facts in every case in which he received a complaint that an offense had been committed and in every case where there was public knowledge that an individual subject to the Church's jurisdiction had committed a crime.[76]

Although the new procedures were intended to make criminal prosecution more effective, they initially contained one serious obstacle that had to be overcome. The abolition of the ordeals had destroyed an entire system of proof. In place of divine judgement guilt was now to be determined by human judgement. In Weberian terms, the jurists of the day had to replace the existing formal irrational system with one of the other three types of legal decisionmaking system. Given the rebirth of legal studies in Bologna in the eleventh century; the renewed interest in Roman law; the study of Aristotelian logic; the belief that the Holy Roman Empire represented a continuation of ancient Roman traditions; and the growing rationalism in the economic and urban spheres,[77] it is not surprising that they adopted a formal rational system of proof.

Jurists agreed that proof of guilt in the new system had to be conclusive. The standard they adopted, which derived from the Roman law of treason and which is generally referred to as the roman-canon law of proof, was extremely high[78] and immediately created pressure to adopt torture. In order to convict there had to be either two eye-witnesses who could testify that they actually saw the crime being committed or the accused had to confess. The rigidity of this law of proof can best be appreciated if it is compared to the standards of proof that English juries often used. They could convict on the basis of hearsay, circumstantial evidence

or the testimony of one eye-witnesses.

Adherence to the roman-canon law of proof presented serious problems in situations where eye-witnesses could not be produced. This was especially true in trials of concealed crimes, such as heresy and witchcraft, but in many other crimes as well. This problem was quickly overcome when the Church reversed its condemnation of torture and endorsed its use in the prosecution of heretics. In the first half of the [illegible] repudiated torture. But in 1252 Pope Innocent IV authorized his inquisitors to use it in the prosecution of heresy.[79] In adopting torture Canon law was following the example of the secular courts of the Northern Italian city-states and was reflecting the influence of the law of the Roman Empire (discussed below).

C. The Impact of the Cities

After the Western Roman Empire was finally demolished by Germanic invaders in the fifth century, almost all the Roman cities in the West rapidly declined. By the ninth century they had virtually disappeared. But then, starting in the eleventh century, peaking in the twelfth and continuing through the fifteenth, 5,000 new towns emerged all over western Europe. In the early fourteenth century--before the Black Death of 1346-50 wiped out as much as one-half of the urban population--there were possibly six million western Europeans living in cities and towns, out of a total population of about sixty million.[80]

A rapid increase in agricultural productivity in the eleventh century produced a surplus population in the countryside resulting in a major exodus of serfs, free peasants, and lesser nobility to the burgeoning marketplaces around the churches and castles. Most became artisans and craftsmen. Others moved quickly up the social hierarchy into the merchant class. These new city dwellers brought about what was has been called the "industrial revolution" of the eleventh and twelfth centuries.[81] The city became a new mode of production as well as a new mode of distribution.

The growth of cities influenced the reemergence of inquisitorial procedure both directly and indirectly. Their direct impact came from their need to devise more effective measures to maintain order within their own jurisdictions. Their indirect impact resulted from the larger social transformation of which they were a part as both cause and effect. The commercial revolution in which they participated undermined the social conditions of small-scale, settled community-life upon which the traditional accusatory system of prosecution had depended.

Vagrants and professional criminals walked the land while honest burghers and tradesmen of the rising towns dismantled the old system of proof by judicial battle. The latter refused to subject themselves to the possibility of being challenged to a duel

when they attempted to get justice. The day when every able-bodied man was accustomed to the use of arms was passing. Some cities even forbade the carrying of weapons.[82] Thus it is not surprising that cities began to limit the use of the judicial duel. In some a citizen could refuse to accept a challenge to trial by battle offered by a non-citizen. In others, acceptance was completely within the discretion of the citizen. Some Flemish and Dutch cities entirely prohibited the challenging of their citizens.[83] Not long afterwards trial by battle was completely prohibited. In France, this was done by an Ordonnance of St. Louis in 1260; in Germany, by an imperial law of Rudolf von Hapsburg in 1290.[84]

In Italy the city-states gradually replaced the barbarian process of trial by ordeal introduced by the traditionally unpopular German invaders. In its stead they resurrected the system of the Roman codes in which torture played a prominent part. Indeed the first documentary evidence we have of the use of torture as part of criminal procedure in the late Middle Ages comes from the laws of the city of Verona in 1228. By the end of the century the statutes of many Italian cities show that torture had been introduced replacing the ordeals.[85] From these cities radiated the influences of the Roman law throughout Western Europe.

The experience of the Italian city-states is particularly instructive regarding the transition from private, accusatorial to public, proactive inquisitorial systems of prosecution. They present an opportunity to examine the development of legal procedures and ideas in the context of rapidly changing social and economic conditions. It was there that modern rational capitalism had its roots. Contrary to Weber's thesis that modern capitalism developed in the sixteenth century with the Reformation and its associated Protestant ethic, historians now argue that modern capitalism began in Italy in the Middle Ages.[86] The Italians invented bookkeeping, double-entry, commercial law, and marine insurance; and were the only ones to use them up to 1500. Other countries obtained these techniques only insofar as they learned and copied Italian methods.

The medieval Italian communes were vitally concerned with the problem of maintaining order and assuring public safety. But they had to proceed under formidable political conditions. The process of state formation at the time was tentative and incomplete. Competition for political power was keen and reversals in political fortunes common. Today's prosecutors might be tomorrow's criminals. Members of powerful noble families were as prone to violence as the members of any social class; and worse, they were not accustomed to thinking of themselves as subject to communal control. Their violence represented one of the major threats to the security of the city because it could easily escalate into civil war. Imposing justice in their cases called for delicate political balancing.[87]

The threat to public safety and the security of political regimes also came from below. Riots posed special threats. They were sparked sometimes by famines and food shortages; but also they easily developed out of private fracases or the playing of certain games involving fist fights and the hurling of stones, staves, spears and knives.[88] In addition, the communes regarded immorality (sodomy) and irreligious behavior (blasphemy) as special dangers to the commonweal.

The communes's approach to the administration of criminal justice not only reflected but participated in the rational calculation of the growing economic sphere. This can be illustrated with a few examples. Siena initially "farmed" the custody of its prisons to citizens or companies, who, in turn, like tax farmers, sought to make a profit by extracting charges from prisoners. Sentences were calculated like financial accounts and finely attuned to perceived differences in the social class of the parties involved, the harm done and the economic needs of the community. A Sienese sentence of 1342 against a woman who had struck a man on the forehead with a lantern and drawn blood, conveys the point. Her fine was increased because of her contumacy, but halved "because a woman against a man", doubled again "because at night," and doubled one more "because she struck him in his house."[89]

Sentences in fourteenth century Venice indicate that a new purpose of punishment had emerged. The vengeance of the Middle Ages had been abandoned. Punishment had re-acquired a political or utilitarian purpose for the state and society. Based on 735 sentences for violent crime and other materials Ruggiero found that the new emphasis on the utilitarian aspects of punishment did not necessarily lead to a new emphasis on cruelty and terror. Rather, he writes:

> "[in Venice] a heightened rationality led to a tendency to weigh penalties almost as if they were an investment in control rather than an indulgence in a blood bath of fear. Moderation and restraint typified the approach of this merchant-banker nobility to the punishment of most crime.
>
> Moderate investment in penalties should not seem strange in this society of bankers and merchants. A good part of their world was controlled through investments, and it was only logical that they carried this technique over into other areas requiring careful control.
>
> ...[V]engeance became secondary to rational punishment while at the same time and in the same context the institutions and procedures concerned with peacekeeping went through a period of growth and rationalization.[90]

Everywhere communal authorities took an active approach to the

control of crime and immorality. They enacted laws establishing strict curfews and prohibiting gambling, frequenting taverns, and bearing unauthorized weapons. They established police forces and experimented with their size, organization and deployment. The sheer number of policemen relative to the size of the population is striking. (In the mid-1330's in Siena there was one policeman for each 145 inhabitants. By comparison, Lincoln, Nebraska, with a population of about 125,000 has one policeman per [illegible] inhabitants; and New York City has a ratio of approximately 1 to 285.) They encouraged secret accusers to denounce crimes by offering rewards of from one-third to one-half (more for treason) of the fines imposed.[91]

Some (e.g., Verona and Roveredo) established official denunciators who were inferior officials acting in limited roles. Others established a true "procurator fiscalis" with all the characteristics of a public prosecutor (e.g., the avogerie of the Venetian commune which existed in the 1200's). By the 1400's certain other Italian districts introduced the office of public prosecutor copying the models that had been established in France and Spain.[92]

An indication of the intensity of these efforts is suggested by the records from Siena. Although incomplete they show that from mid-1279 to mid-1296 over seventeen thousand persons from the city and surrounding countryside (contado) were fined for criminal acts. In a brief three weeks in 1298 only one judge for a single third of the city heard seventeen criminal cases.[93]

The communes developed a more fully socialized conception of crime than had existed. By the late Renaissance period, in some republics like Venice, it included a view of the state as having responsibility for providing justice for all society; and it was accompanied by a more efficient administrative machinery for implementing that responsibility. Such developments occurred in stages, were affected by class and factional conflicts; and were not inevitable, as Blanshei's analysis of thirteenth century Bologna illustrates.[94]

The criminal justice system in Bologna in the first half of the thirteenth century was one in which the communal government had assumed jurisdiction over crime from kinship groups but still retained many of the assumptions of the kinship system. The vendetta continued to be recognized as valid although it was restricted so that vengeance could be pursued only against the offender and not against his relatives. The interests of the community in crime and punishment were viewed as indirect and as stemming not from the injury itself but from the possibility that the unbridled pursuit of a vendetta would destroy the community.

An abstract conception of crime as an offense against the entire community had developed, but its scope was limited to

matters perceived as directly offensive to community morality or safety. These bore an affinity with the conditions of urban life. They included crimes such as carrying weapons or gambling (laws which the government assumed direct responsibility for enforcing); crimes punishable by corporal punishment (arson--punishable by decapitation--and giving false testimony--amputation of the right hand); and crimes committed by undesirable people whom the community wanted to expel (prostitutes, sodomites, adulterers, counterfeiters, heretics, false accusers, and traitors).

Most major crimes, such as murder, assault, theft, and rape, continued to be viewed as private wrongs between individuals, not offenses against the community. The role of the government in these crimes was to reconcile the accuser and the accused. The penalties for all these crimes were monetary. If the culprit could not pay the fine, he or she would be banished from the community and could not return until the fine had been paid. Moreover, the offender could not return unless the formal consent of the victim or the victim's family was obtained in the form of a pax: a formal peace agreement. The banishment records of 1234-35 include thirteen murder cases with specified fines. In three the fines had been paid and the accused had obtained a pax resulting in the banishments being lifted.

Throughout the rest of the thirteenth century pressures were exerted on this partially socialized, partially privatized, vendetta system of criminal justice pulling it in conflicting directions. The major exponent of a more fully socialized conception of crime and criminal justice was the increasingly powerful political configuration, the popolo or "popular" party[95]. Reflecting the interests of the rising class of merchants, tradesmen, artisans, and professionals (such as lawyers and notaries), this party opposed the interests of the magnati, the traditional nobility.

Popolani-magnati conflicts were part of a larger social movement and occurred in other northern and central Italian cities as well. The points of conflict were many: tax and grain policies, communal offices, church privileges, as well as matters of law and order. In other cities the popolani had sought special protection by means of heavier fines against magnates and obtained the privilege of secret accusations against magnates. In Bologna, they pressed for a new, more impersonal and public conception of crime and justice.

This was expressed in the popolo ordinances of 1248, 1282, and 1284. In each of these legislative programs, crime deterrence was a major concern. The new view was that the government should no longer serve merely to reconcile the accused and the victim. Punishment should be used to discourage future crimes. Potential criminals were to be restrained by the knowledge that their crimes could not be expiated by mere monetary penalties and agreements

with victims.

Significantly, homicide, which had formerly been punishable by a mere fine, became a capital crime. The popolo statutes of 1248 (enacted in the communal statutes of 1250) represent the first statutory evidence from Bologna for capital punishment for murder. Those statutes also attacked the privatizing feature of the law by which convicted criminals could have their banishments annulled if the victim consented. Now, all major crimes were to be punished by perpetual banishments without the possibility of annulment. Moreover, major crimes were defined to include not just the traditional crimes against the state (treason, false testimony, counterfeiting, and sodomy) but also acts which had formerly been regarded as private harms including murder, kidnapping, highway robbery, pace rupta, famoso latrone, and hired assault.

Another feature of popolo reform legislation was an attempt to prevent crime by requiring individuals perceived as dangerous to post securities guaranteeing their future good behavior. These provisions were directed primarily against the magnati, which included some of the most powerful and wealthy noble families of Bologna. Their members were required to post securities of 1,000 pounds or be perpetually banished and have their properties confiscated. Remarkably from today's perspective, it was not the poor but the wealthy who were regarded as potentially the most dangerous group.

The popolo reforms did not survive through the end of the century. In the 1290s a war with Ferrara prompted the Bolognese to cancel existing banishments as a means of obtaining needed manpower. Later political realignments resulted in an overthrow of the popolo programs and a return to the more privatized, vendetta-based view of crime and justice. Nevertheless, the experience illustrates some of the forces behind the changing legal procedures of that epoch.

V. France and Her Systems of Prosecution

A. The Ancient Regime

Modern "inquisitorial" (Continental) systems of criminal procedure bear the strong imprint of the French code adopted in 1808. That code in turn owes much of its character to the inquisitorial procedure of the ancien regime and to the English accusatorial system introduced during the Revolution.[96]

Louis XIV crystallized the criminal procedure of the ancien regime with the Ordonnance Criminelle of 1670. The procedure had been developing for three centuries. By then the system of private accusation had almost completely vanished.[97] There was but one true accuser, the king's procurator or that of the lord. He prosecuted in the name of the king (or lord) and the common good. The private

party could only ask for damages. He could proceed either by denouncing a crime to the king's procurator (who did not always act) or filing a complaint (by requesting permission from the judge to inform).

The entire procedure was dominated by the secret preliminary investigation conducted by a magistrate known as the lieutenant criminel. The findings were incorporated in a written report which became the basis for the trial judge's decision. In theory the procedure as supposed to protect the accused in two ways. It contained some formalities to check the honesty of the testimony upon which the trial would be based; and, it employed the system of Roman-canon legal proofs which had replaced the old ordeals. In practice neither method afforded any real protection for the accused, quite the contrary.

The depositions of witnesses were taken out of the presence of the accused; were not transcribed verbatim but reconstructed based on notes taken during the interview; were not provided to the accused in advance of trial; and were frequently biased in favor or against the accused at the whim of the recording official. The accused was interrogated cruelly and treacherously by the judge in private without the aid of counsel and without having had any knowledge of the charges or information against him. In theory the judge defended the accused at the same time that he prosecuted him.

At the conclusion of the preliminary examination the record was entrusted to the king's procurator so that he might make his final motions which could include a request for a penalty or for torture (to obtain a confession) or for proof of additional facts. The case was then presented to the panel of trial judges by the same judge who had conducted the examination. The trial was conducted in secrecy on the basis of the written record except for a final interrogation of the accused. If the evidence established strong presumptions but the proof did not meet the stringent standards of the law, then the judge could order torture in order to obtain a confession.[98]

In the end if the evidence met the legal standard of a full proof (e.g. a confession), conviction was automatic even if the evidence seemed problematical to the judges. There was no place in the Roman-canon law of proof for the subjective or "free" evaluation of the strength of the evidence. What is more, if perchance the accusation were found to be baseless, the accused might still not entirely escape the grip of the merciless procedure.

Three outcomes were possible: acquittal, "putting out of court," and "further inquiry." Acquittal was the pure and simple rejection of the accusation and gave the accused the right to proceed for damages against the civil party. The "out of court"

was a less complete acquittal. The accused was not discharged as acquitted but was put out of court unabsolved, left under suspicion and unable to claim damages. The "further inquiry" was regarded as the safest and most regular of all. It was used when there was not enough proofs to condemn but still enough to prevent acquittal. For instances of serious crimes where the presumptions were strong, "further inquiry" could be set for an indefinite period of time during which the case could be reopened upon the discovery of new evidence.[100]

The use of torture to obtain confessions had not been permitted under the ancient feudal customs. Naturally, in a system based on private accusation, it had no place. Its introduction into French practice began gradually in the second half of the thirteenth century and grew in importance with the extension of royal power. Its spread was resisted by the communes and the nobility alike. By the early fourteenth century a league was formed among the feudal powers of France to protest the new institutions developed so carefully by St. Louis and his successors. Their complaints and demands for the restoration of the old order of things were met by skillful evasions and artful promises.[101] The complaint about torture was responded to by royal lawyers trained in the Roman-canon law which led them to regard torture as an immense improvement in procedure, especially as it enabled them to supersede the wager of battle,[101] which they correctly regarded as a most significant symbol of feudal independence.

In the end, the use of torture was permanently established in the judicial machinery of France and the clever royal response constituted one of the incidents in the great revolution which destroyed the feudal power. The nobles obtained from the king a series of charters vaguely defining the extent of royal jurisdiction claimed and promised to relieve them of certain grievances. But several charters made no allusion to torture and others granted only small concessions or vague promises.

The charter of Languedoc contained a particularly clever ruse. It granted a trifling exemption from torture for certain privileged families but it also contained the provision that the concession did not hold good in cases of "lese-majeste or other matters particularly provided for by law". The whole clause was borrowed from Roman law. Its main significance, however, lay in the fact that it was the first time that French jurisprudence recognized the crime of lese-majeste. It marked the triumph of the civil over the feudal law.[102]

In its early history the use of torture had been restricted by various safeguards intended to prevent the condemnation of an innocent man on the basis of a false confession extracted from him.[103] For example, the coerced confessed was not held to be legally valid unless it was ratified after the torture had ceased.

Torture could not be used unless there already existed strong presumptions of the crime. But under the secrecy of the proceedings and the lack of an alternative method of obtaining the necessary proof especially in crimes of heresy, witchcraft and heinous crimes for which there were no witnesses, the safeguards were insufficient. "Inquisitorial" procedure became completely dependent upon coerced confessions. This had happened long before Louis XIV's Ordonnance.

By the sixteenth century opposition to the new inquisitorial procedure had virtually ended. The Estates General had several opportunities to criticize it but only quibbled with a few details. The procedure imposed by growing monarchy now enjoyed the consensus of the people.[104] But in the eighteenth century the onslaught began. Montesquieu,[105] Beccaria,[106], Voltaire[107] and a host of other thinkers attacked its vices. A search for alternatives found that all the European countries with the inquisitorial procedure shared the same evils. In contrast, England had preserved the accusatorial procedure; and, it appeared to French reformers to guarantee the rights of the individual lacking in French law. This view was epitomized in Voltaire's observation that English criminal procedure was directed toward the protection of the accused while French procedure was directed at his destruction.

B. The Revolution and Napoleon

On the eve of the Revolution under public pressure the government abolished some of the worst abuses (including torture) and began to prepare for a general revision of the code. It was too late. In 1791 the Constituent Assembly enacted a general reform consisting of a deliberate sacrifice of all French institutions and a wholesale importation of English criminal procedure. It was anti-authoritarian intended to check the power of the government and protect the individual. The old procedure seemed designed to convict a hundred innocent people least one guilty one go free. The new one would reverse the balance.

But, the balancing changed with political fortunes. By as early as 1795 France began to reinstall the old forms, especially the preliminary procedure. The chaos of the period called for more effective repression than the new procedure could provide. Moreover, the excesses of the Revolution provoked a reaction. Liberty became less important than security. By the time Napoleon was emperor the impetus to reassert the government's advantage was strong.[108]

The code of procedure adopted in 1808 at the recommendation of Napoleon's commission created a hybrid of French inquisitorial and English accusatorial elements. The preliminary investigative stage was once again secret, non-confrontational and dominated by an investigating magistrate with enormous powers. But, the trial

(at least in the court with jurisdiction over the most serious crimes, the Cour d'Assises) was public, oral, before a jury, with the accused given the right to counsel and full opportunity for defense, and with a new standard of proof replacing the old Romano-canon system of proofs. The jury was to base its decision upon "an intimate conviction" reached as a result of the evidence presented in open court. After five centuries of mechanical proofs the decision as to guilt was now entrusted to human judgment.

The Revolutionary reform of 1791 eliminated the lieutenant criminel, the old investigating magistrate, as well as the Public Prosecutor. The latter was replaced by two officials. The principal figure in the new preliminary proceeding became as in England, a justice of the peace, an elected official. Upon a complaint made to him, he could summon the accused and witnesses, conduct a hearing and decide whether to hold the accused for the action of the Grand Jury (a new English import) or dismiss the complaint.

Napoleon's Code of 1808 restored the public prosecutor and the investigating magistrate now called the juge d'instruction. As before he had the duty of gathering the evidence needed to determine whether a prosecution should proceed and of preparing the evidence in the form of a written document which would guide the trial. He was given wide powers of interrogation, search and seizure (although torture continued to be prohibited). He could commission experts to aid him in his investigations; and could order the accused detained. His function was to seek out the truth.[109]

The Code showed no concern about the possible abuse of the powers of the juge d'instruction. On the contrary, it was said that he provided a judicial guarantee of the impartiality and integrity of the investigative process. Indeed, he was regarded as a replacement for the short-lived grand jury which the Revolutionaries had introduced in order to have an independent, third party review the sufficiency of the evidence before submitting the case to trial. Napoleon's commission eliminated the grand jury for all cases except the most serious ones, those tried by the Cour d'Assises.

VI. Modern Inquisitorial Prosecution

Reactionary legal theory notwithstanding, abuses of the power of the juge d'instruction did occur; and, the institution was vigorously criticized throughout the remainder of the century. By the early twentieth century there was general dissatisfaction with it not only in France but also with its corresponding institutions in Germany and Italy.[110] In addition to the continuing liberal complaint about its excessive concentration of power, the investigating magistrate was being antiquated by the forces of rationalization.

Urbanization and the advancement of science were producing greater opportunities for committing crimes and while simultaneously transforming the prosecution process. The means of detecting crimes, and identifying and capturing criminals were becoming more technical and specialized. The new methods were described in handbooks on police scientifique.[111] Investigating magistrates lacked familiarity with these new methods of investigation and had to rely upon trained police officers who were.

More significantly, the work of both the police and the public prosecutor, had grown in importance relative to that of the investigating magistrate. The division of labor among the agencies of justice shifted as part of an effort to achieve greater efficiency in the processing of cases. The trend was that in the larger urban centers the investigating magistrate made no independent investigations but served merely as superficial checks upon the investigative efforts of the police. The practice developed whereby the magistrates delegated to the police the performance of specific acts of investigation. In fact the magistrates practically abdicated their function by charging the police in very general terms to do everything necessary to clear up a case. What is more, even when the police were not formally requested to act by the magistrate, they started acting on their own account.[112]

At the same time, the office of public prosecutor had assumed greater significance. The investigating magistrate could not proceed on his own initiative. His investigation began only when authorized by the prosecutor; and the prosecutor's request for the investigation was discretionary. However, prosecutors were not inclined to make those requests. The Public Prosecutor was searching for expeditious means of disposing of caseloads. One way of doing this was by downgrading the charge in order to divert the case into a court with swifter procedures.

In France this practice was (and continues to be) known as the "correctionalization" of offenses. It involved downgrading serious offenses, crimes, to less serious ones, delits, triable in the Correctional Court (Tribunal Correctionel). Cases tried there avoid the delay and expense of an investigation by the juge d'instruction and of a jury trial; and they are more likely to result in a conviction. Many serious offenses were reduced by the simple expedient of leaving out the aggravating circumstances. For instance, burglary becomes theft.[113]

Over time such bureaucratic forces shrank the investigating magistrate's role in European preliminary procedure. In France between 1920 and 1928 only 12 per cent of the complaints received by the prosecutor were turned over to the investigating magistrate. In Germany the percentage steadily declined. From 1881 to 1885,

68 per cent of the complaints were turned over; but by 1927 that percentage had dropped to 27.[114] The police and the public prosecutor had taken over the investigation, preparation and disposition of cases. The investigating magistrate had been reduced to what one prominent French judge described as "merely an assistant to the Procureur."[115]

It remained for law to catch up with realty. In pre-Hilter Germany there was a strong move to abolish the investigating magistrate. The incompatibility of his judicial and the prosecutorial functions was recognized as was the inefficiency of splitting the investigative responsibility between him and the public prosecutor. It was proposed that the magistrate should serve only judicial functions and the public prosecutor should assume full responsibility for investigation and case preparation.[116] But, the Nazi regime forestalled the reform and continued with the 1879 Code of Criminal Procedure of the German Reich. It was not until 1975 that the Federal Republic of Germany abolished the investigating magistrate. The reasons for doing so were to expedite proceedings and because the suspicion that had surrounded the office of the public prosecutor from the time of its inception in last century had proven to be unfounded.[117]

Similarly, in 1913 in Italy the Code of Criminal Procedure in effect since political unification in 1865 was revised to produce a more workable system of procedure. But, because it was motivated by liberal, antiauthoritarian ideals it was quickly repealed and replaced by the Fascist code of 1931.[118] The investigating magistrate was retained by the Fascists; but it has not survived the efficiency-seeking reform that produced the Code of 1988.[119] The mandate of that reform clearly poses the choices for the liberal state. The government was directed to develop a new code that would respect the rights guaranteed by the Constitution of the Italian Republic and the Convention for the Protection of Human Rights and to achieve "the maximum simplification of criminal procedure".[120]

It is worth noting that at about the same time the Europeans were becoming disenchanted with the investigating magistrate, Americans developed an interest in it and, despite warnings[121] have continued to paint it in favorable, sometimes mythic, terms. It continues to be considered as a possible remedy for problems afflicting the American system including the need for an impartial early review of cases as well as the evils of police third degree practices.

In drafting its Code of Criminal Procedure in 1928 the American Law Institute (ALI) considered but rejected the European, "inquisitorial" system of preliminary examination. The ALI approved of a judicial inquiry for the purposes of determining probable cause, for perpetuating the evidence, and for deciding upon pretrial release and questions of bail. But it unanimously

disapproved of judicial interrogation of the accused for the purpose of obtaining evidence of guilt as was done by the European investigating magistrate.[122]

It gave several reasons for the rejection. The European countries were extensively modifying their examinations in the direction of giving defendants a greater opportunity to remain silent. American magistrates did not have the specialized training in interrogation and cross-examination techniques which the ALI wrongly believed the European magistrates had. The majority of lawyers consulted about the topic objected to it on the grounds that it would be held unconstitutional and would unjustly convict innocent people.

The main argument in favor of the European model was that it would do away with the "third degree" methods used by police to obtain confessions. At the time the widespread use of such tactics among American police were being documented and the Supreme Court would not impose the exclusionary rule upon the states for another three decades. But, the ALI concluded that there was no assurance that a judicial interrogation of the accused would end illegal police interrogations. Nevertheless, that idea has never been completely put to rest.

In the 1930's Rosoce Pound[123] and Paul Kauper[124] published separate articles supporting the idea. In 1974 Yale Kamisar reprinted Kauper's article along with his own piece in which he praised and supported (with modifications) Kauper's proposal.[125] In 1966 Gerhard Mueller described the investigating magistrate as an institution that "combine[s] the absolute integrity and impartiality of the judicial office with the power of the prosecution, the investigative skill and expertise of the police, and the powerful reach of the grand jury." He went on to say that if we insist upon prompt production of every suspect before a judicial officer and if we are unwilling to sacrifice the helpful investigative contribution of the police, then "we may well have to take another look at the European institution of the investigative magistrate."[126]

Another look at the investigating magistrate was taken by two more skeptical American researchers, Abraham Goldstein and Martin Marcus, as part of a general assessment of the effectiveness of judicial supervision of the investigative and prosecution processes in Continental systems. Their findings and conclusions are notably similar to those of Morris Ploscowe's decades earlier. Based on interviews and observations in Italy, France and West Germany, they report that judicial supervision is a "myth". In Italy and France where the investigating magistrate still existed, he rarely conducted an investigation. Instead, it was the prosecutor's office that had assumed responsibility for most investigations. When a judicial examination did occur, as in serious crimes, it usually amounted to little more than a limited superintendence of

a police investigation. "The dossier, on which the trial is based, is usually compiled by the police; only occasionally does the prosecutor or examining magistrate make an important contribution."[127]

The fate of the investigating magistrate illustrates the differentiation of prosecution institutions as shaped by the conflict between the search for bureaucratic efficiency, on the one hand, and the requirement among free societies for protection against wrongful conviction, on the other.

Endnotes

1. Quoted in Ehrenberg, 1968: 67.

2. Quotation attributed to Solon by Plutarch. Quoted in Bonner and Smith, 1930: 170.

3. Quoted in Bonner and Smith, 1930: 170.

4. Quoted in Ehrenberg, 1968: 60.

5. Calhoun, 1927: 44.

6. Calhoun, 1927: 48ff.

7. Ehrenberg, 1968: 61.

8. Calhoun, 1927: 53.

9. Calhoun, 1927: 79.

10. Bonner and Smith, 1930: 12.

11. Bonner and Smith, 1930: 16.

12. Bonner and Smith, 1930: 19.

13. bonner and Smith, 1930: 26.

14. Jones, 1956: 65, fn.33.

15. Jones, 1956: 257.

16. Jones, 1956: 257.

17. Bonner and Smith, 1930: 26.

18. Calhoun, 1927: 61.

19. Jones, 1956: 128.

20. Anyone who cut down more than the number of live trees permitted by law could be prosecuted. The successful prosecutor received one-half of the value of the property confiscated or t of the fine levied. Successful recovery of state property which was unlawfully in the possession of individuals (usually relatives of a person whose property was confiscated or a state debtor) yielded three-fourths of the property recovered (Bonner and Smith, 1938: 41).

21. **Bonner and Smith, 1938: 41ff.**

22. Bonner and Smith, 1938: 49.

23. Bonner and Smith, 1938:42.

24. Jones, 1956: 123.

25. Exceptions were made for matters regarded as needing extra vigilance such as protecting orphans from their guardians (Bonner and Smith, 1938: 59).

26. Bonner and Smith, 1938: 62.

27. Quoted in Strachan-Davidson, 1912: 41.

28. Quoted in Strachan-Davidson, 1912: 107ff.

29. Ploscowe, 1935: 454.

30. Maine, 1901: 384.

31. Esmein, 1913: 16.

32. It is not settled as to whether at the time of the Republic there were special officers whose duty was to investigate crimes and bring prosecutions. The "quadruplatores" may have borne some of this responsibility. Esmein, 1913: 19.

33. Esmein, 1913: 18ff.

34. Peters, 1988: 14.

35. Jones, 1972: 26.

36. Esmein, 1913: 19.

37. Strachan-Davidson, 1912: 137.

38. Strachan-Davidson, 1912: 139.

39. If a false witness rise up against any man to testify against him that which is wrong;
Then both the men, between whom the controversy is, shall stand before the Lord, before the priests and the judges, which shall be in those days;
And the judges shall make diligent inquisition: and, behold, if the witness be a false witness, and hath testified falsely against his brother;
Then shall ye do unto him, as he had thought to have done unto his brother. Deuteronomy 19:16-19.

40. **Strachan-Davidson, 1912: 164.**

41. See generally, Esmein, 1913.

42. Esmein, 1913: 21.

43. With regard to the question whether plea negotiations occurred, it is relevant to note that even if the accused confessed during the preliminary investigation stage a formal trial would still be held before a judgment could be entered (Esmein, 1913: 24). This parallels modern procedure in Italy, France and West Germany. Indeed it is this requirement of a trial even after a confession of guilt that is regarded by some (Langbein and Weinreb, 1978) as evidence that these countries do not have plea bargaining or its functional equivalent. But others (Goldstein and Marcus, 1977) argue the opposite. They show how confessions followed by trials may still represent negotiated cases. Whether the latter's analysis is accurate for the modern times has been challenged. Whether it could be correctly applied to Roman times is that much more problematic.

44. Esmein, 1913: 23. But see Jones, (1972: 126, fn.48) where it is reported that during the Republic a charge could be made "alieno nomine", presumably by a procurator of the injured party.

45. Jones, 1972: 93.

46. Jones, 1972: 97; Strachan-Davidson, 1912: 158.

47. Quoted in Jones, 1972: 116.

48. Quoted in Jones, 1972: 116.

49. According to Stephen (1883: 43) the eirenarchae were not police officials but more like English justices of the peace. But his supporting sources do not resolve the question. He cites an edict from Antonius Pius when President of Asia in which he orders that eirenarchae, when they apprehend robbers, should question them about their accomplices and receivers and send their examinations in an sealed letter to the President. Of course, this interpretation accords with that of William Lambard's Eirenarcha: or Of the Office of the Justice of Peace (1581).

50. Esmein (1913: 29, fn.4) asserts that the advocatus fisci were not public prosecutors but he does not clarify what their role was.

51. Jones, 1972: 116.

52. **Constantine in A.D. 321 (Code of Theodosius, II. 18.I) (Strachan-Davidson, 1912: 165, fn.2).**

53. Constantine in A.D. 326 (Code of Theodosius IX. 19.2) cited in Strachan-Davidson, 1912: 165, fn.3.

54. Strachan-Davidson, 1912: 170ff; Peters, 1988: 16; Lea, 1973.

55. In 314 the courts of the Church were given the same status as belonged to those of the imperial magistrates (Ives, 1970: 30).

56. Ploscowe, 1935: 437.

57. Ploscowe, 1935: 437.

58. Lea, 1973.

59. Lea, 1973: 140; Levack, 1987: 66.

60. Lea, 1973: 138.

61. The system of evaluating evidence and assigning them numerical values (quarter proofs, half proofs, and the like) was related to the evaluation of circumstantial evidence which was not directly consulted on the question guilt or innocence (Langbein, 1977: 6.)

62. This fact was recognized in Solon's sixth century (B.C.) comments on dysnomia and was vividly portrayed in the 14th century (A.D.) murals entitled, "An Allegory of Good Government", and "An Allegory of Bad Government", by Ambrogio Lorenzetti on walls of the Palazzo Pubblico in Siena (Edgerton, 1985).

63. Citing Muratori (Historians of Italy, and Collection of Muratori) Montesquieu (% Montesquieu, 1949) notes that Carolvingian law also provided for a third type of prosecuting mechanism, namely, a public prosecutor. An advocate for the public prosecutor was authorized to sue on behalf of the exchequer for the property, fines and other things which the law adjudged to the exchequer as punishments for specific criminal acts such as (patricide, insurrection, failing to bring a robber before the count, and other matters).

64. Esmein, 1913: 97.

65. According to a capitulary for Italy the offenses to be inquired into were homicide, theft, incest and other sex offenses. In West Frankish laws the offenses of interest of a Rugeverfahren were: robbery, theft, and sorcery. Other offenses inquired into included those committed in the king's

forests as well as malfeasance in office by law and ecclesiastical officials (Ploscowe, 1935: 442, fn.14).

66. Esmein, 1913: 96ff.

67. Esmein, 1913: 100.

68. Esmein (1913: 123, fn.5) provides several examples of this taken from the Criminal Register of Saint-Martin des Champs:

On February 23, 1338, Endelot de Picardie denounced against Guillaume Damours, mason, that he had ravished her. The entry read: "The said Endelot denounced the aforesaid crime, and asserted on oath that the said denunciation to be true, and which the said Guillaume denied completely. ---And this done, he immediately required and summoned the said Endelot, if she had any witnesses by whom she could inform us of the truth of the said fact, that she should name and produce them, which she swore and affirmed on her oath that she had not. ---And to fully inform ourselves of the said case we grant day to the said Endelot on Thursday next. ---Acquitted because she never prosecuted her denunciation."

---November 26, 1336: "Sedilon la Franquette...held in our prison on the denunciation of Guillot...delivered because he withdrew and claimed nothing of him."

69. Esmein, 1913: 123.

70. Esmein, 1913: 115.

71. Esmein (1913: 119, fn.5) reports entries reflecting such actions by the king's procurator and a lord's procurator in the Criminal Register of the Chatelet of Paris.

---March 24, 1391-92: "Gerart de Sanseurre was taken from the prison of the said Chatelet and brought before the aforesaid...who it was said and maintained by such procurator was an idler and a vagabond, without means or employment, etc."

---September 2, 1930: "Jehannin le Fournier...was taken from the prisons of my lord the duke at Tours...and was brought to trial in open hearing ...and was there, by the procurator of said my lord the duke...accused of being of the condition and a confederate of certain prisoners who went up and down the land."

72. These inquisitions with the juratores synodi could be extremely punitive in the hands of moral zealots. The energetic Bishop of Lincoln harried his diocese with minutely personal examinations which revealed so many scandals among

all levels of society that he had to be checked by Henry III (Ives, 1970: 31).

The episcopal visitations were highly unpopular and created many spies and informers (Ives, 1970: 32, fn.2).

73. At a much earlier time in the history of Canon law there had been a procedure similar to this. It was called denunciatio evangelica. Its origins lay in the early history of the Christian community when one Christian was expected to denounce against another. It was based on passages of scripture such as the following:

> Moreover, if thy brother shall trespass against thee, go and tell him his fault between then and him alone; if he shall hear thee, thou hast gained thy brother.
>
> But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established.
>
> And if he shall neglect to hear them, tell it unto the church; but if he neglect to hear the church, let him be unto thee as an heathen man and a publican (Matthew 18:15-17).

This procedure could have but did not become the doctrinal basis for the denunciation that later developed in criminal procedure, despite efforts of early Canon writers to develop such a doctrine (Esmein, 1913: 85).

74. Esmein, 1913: 87.

75. Esmein, 1913: 88.

Esmein seems to suggest that the development of the office of the ecclesiastical procurator was influenced by the emergence and development of the king's procuratores and the fiscals of the high lords. But he does not demonstrate this. Given the simultaneous emergence of the two offices and the higher regard with which Canon law was held than secular law at the time, it seems more plausible that the primary direction of the undoubtedly mutual influence was from Canon to secular law.

76. Ploscowe, 1935: 447; Esmein, 1913: 80; Lea, 1973: 53.

77. Berman, 1983; Lea, 1973: 53.

78. Langbein (1977: 6) attributes this choice to a conscious effort to solve the problem of legitimacy created by the transition from divine to human judgement. He suggests that the jurists chose the new system of statutory proofs which eliminated all judicial discretion and requires objective criteria of proof as a way of making this fundamental change in law acceptable to the tradition-conscious and religiously

devout people of that day? How else could people be persuaded to accept the judgment of human judges today, when only yesterday the decision was being made by God?

While there was undoubtedly some concern for legitimacy, this interpretation ignores the cultural context in which the authors of this change operated and fails to explain why the other modes of decisionmaking might not have been rendered equally legitimate or, at least, attempted.

79. Levack, 1987:71; Esmein, 1913: 91. See Lea (1973: 51) for a fuller account of the Church's earlier condemnation of torture.

80. Pirenne, 1925; Mumford, 1961; Berman, 1983.

81. Berman, 1983: 359.

82. Blanshei, 1981; Bowsky, 1970: 34.

83. Kries, Der Beweis im Strafprozess Des Mittelalters (1878) cited in Ploscowe, 1935: fn.15ff.

84. Ploscowe, 1935: 443.

85. Lea, 1973: 55ff.

86. Although Weber dates the spread and ultimate cultural legitimization of capitalism to the Protestant era, he was aware of the commercial revolution that occurred in the Middle Ages. Moreover, he asserts a close affinity between the economic interests involved and the socialization of the communal apparatus of crime control.

"Even before the political authority imposed public peace in its own interest, it was they (the burghers of the towns as well as all those guided by market interests) who, in the Middle Ages, attempted, in cooperation with the church, to limit feuds and to establish temporary,...or permanent leagues for the maintenance of public peace (Landfriedensbunde)" (Weber, 1954: 3460).

87. See generally, Blanshei, 1981; Ruggiero, 1980; Wolfgang, 1954; and Wolfgang, 1956.

88. Bowsky, 1970: 34.

89. Quoted in Bowsky, 1970: 33.

90. Ruggiero, 1980: 43.

91. Bowsky, 1970; Blanshei, 1981.

92. **Esmein, 1913: 294.**

93. Bowsky, 1970: 23.

94. Blanshei, 1981.

95. The term, "popular," party is misleading in that the lowest classes were represented in this group.

96. Ploscowe, 1932.

97. One last trace of the old accusatory system, however, remained. It is of significance today as a forerunner of and possible model for alternative dispute settlement mechanisms which are being sought as means for relieving court congestion. The prosecution of minor offenses not meriting corporal punishment could be terminated by the intervention of a settlement between the injured and the guilty parties (Esmein, 1913: 31

98. Esmein, 1913: 278-287; Lea, 1973: ch. 7.

99. Esmein, 1913: 238ff.

100. Esmein, 1913: 112; Lea, 1973: 68ff.

101. The judicial duel had been prohibited by the Ordonnance of 1260 of St. Louis and proof by witnesses substituted for it. However, it continued in use for a long time. Philip the Fair had had to reestablish it temporarily within the crown domains in 1306 because of the great difficulty in meeting the requirement of producing to eye-witnesses to sustain a conviction. But this problem was soon solved the use of torture to obtain confessions (Esmein, 1913: 105ff).

102. Lea 1973: 69.

103. Langbein, 1977.

104. Esmein, 1913: 174. However, among the commentators on the reform proposals there were critics who strongly lamented its insufficient protections for the accused.

105. Montesquieu, 1963: Bk.6, Ch.2 and 3; Bk.12.

106. Beccaria, 1963: Ch. XVI.

107. Voltaire's treatise on justice and humanity.

108. Ploscowe, 1932.

109. Ploscowe, 1932.

110. Where he is known as the Untersuchungsrichter and the giudice istruttore, respectively (Ploscowe, 1935).

111. Ploscowe, 1935: 1030.

112. Ploscowe, 1935.

113. Ploscowe, 1935; Goldstein and Marcus, 1977.

114. Ploscowe, 1935: 1012.

115. Quoted in Ploscowe, 1935: 1033.

116. Ploscowe, 1935: 1035. The new Italian Code of Criminal Procedure has established precisely this separation of judicial and prosecutorial functions between the judge responsible for the preliminary examination and the prosecutor (Di Nicola, 1988).

117. Herrmann, 1978: 183,192.

118. Cappelletti et al., 1967: 47.

119. Codice di Procedura Penale, 1988.

120. Gazzetta Ufficiale, Law No. 81 of 16 February 1987, Article 2.

121. Ploscowe, 1932; and Ploscowe, 1935.

122. American Law Institute, 1928: 26ff.

123. Pound, 1933.

124. Kauper, 1932.

125. Kamisar, 1974.

126. Mueller, 1966: 354. See also Pugh, 1976: 960.

127. Goldstein and Marcus, 1977: 280.

Chapter 3

THE DEVELOPMENT OF CRIMINAL PROSECUTION II: ENGLAND, SCOTLAND AND AMERICA

I. England: A "Private" Accusatory System

A. Delayed Modernization

The two most striking features about the history of criminal prosecution in England (and Wales) are that it did not develop into the "inquisitorial" form taken on the Continent and until the enactment of the Prosecution of Offenses Act in 1985 it lacked a mechanism by which the state could systematically regulate the flow and mix of criminal cases in the court system. The advanced stage of the socialization of criminal prosecutions did not arrive in England until comparatively late.

For centuries England has relied upon a system of "private" prosecution. In any criminal accusation whether it was brought by a private citizen or a police officer the legal theory was that the matter was essentially private. A prosecuting police officer was considered only a citizen in uniform with no special powers of prosecution and no monopoly on the right to prosecute. Although prosecutions were brought in the name of the king and crime had been conceived of as a violation of his peace since the middle ages, the prosecution itself took the form of a private suit.

The feature that gave the whole procedure the character of a private litigation was that until the late eighteenth century the private citizen had to pay the entire costs of every prosecution. When the movement to improve the effectiveness of the machinery of crime control began, this feature was quickly identified as a critical defect. In his essay on the causes of the increase of robberies, Fielding pointed to the extreme poverty of prosecutors as one cause of the escape of offenders.

> "This I have known to be absolutely the case that the poor wretch who hath been bound to prosecute was under more concern than the prisoner himself. It is true the necessary cost on these occasions is extremely small: two shillings, which are appointed by Act of Parliament for drawing the indictment, being, I think, the whole which the law requires, but when the expense of attendance, generally with several witnesses, sometimes during several day together, and often at a great

distance from the prosecutor's home....are summed up, and the loss of time added to the account, the whole amounts to an expense which a very poor person already plundered by the thief must look on with such horror that he must be a miracle of public spirit."[1]

The haphazard nature of the arrangement was vividly portrayed by the Edinburgh Review during the mostly unsuccessful efforts of the last century to establish a public prosecutor.

> "It would be difficult to make an intelligent foreigner believe that in ordinary cases it is left very much to chance to determine, not only who the prosecutor shall be, but whether there shall be any prosecution at all. Except in cases of high treason or sedition, it is no part of the official duty of the Attorney-General to institute a prosecution, although it frequently happens that he does so when a crime of more than usual magnitude has been committed....
>
> But in all other cases it is left to the committing magistrate to determine who the prosecutor shall be. Sometimes it is the party injured, or, if he be dead, his friends or representatives. Sometimes it is the policeman who has been employed to get up, as it is called, the evidence. [Most often it was the magistrate's clerk.] And often the prosecution is dropped altogether because nobody feel sufficient interest to go on with it. It must be borne in mind that although the Crown is always nominally the prosecutor, and the two parties at the trial are the Queen and the prisoner, yet in reality where there is a private prosecutor, the conduct of the case is left entirely to him. and he employs his own attorney to prepare the evidence and retain counsel."[2]

The move to rationalize the machinery of crime control in England which began in the late eighteenth century succeeded in transforming corrections and policing[3] but failed to include the management of prosecutions. It did not produce a true public prosecutor through whom policies regulating access to criminal justice could be implemented with bureaucratic precision.

The Office of the Director of Public Prosecutions established in 1879 was not conceived of as a major prosecuting organization. It was only to prosecute "in cases which appear to be of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, appear to render the action of such Director [of Public Prosecutions] necessary to secure the due prosecution of an offender".[4] Indeed, the office was discontinued from 1884 until 1908 when it was reestablished but was still not intended as a major prosecuting organization. Thus, in 1937 the Director prosecuted only 659

persons for indictable offenses and only 107 persons for non-indictable offenses. In the same year there were 85,017 persons tried for indictable offenses (of which 9,083 were sent for trial on indictment) and 765,014 persons charged with non-indictable offenses. Clearly, the Director did not prosecute in more than a small minority of cases, even among the more serious ones.[5]

Criminal prosecution remained as a private system. The costs of prosecution had eventually shifted to the modern police after their creation in 1829. By the 1980s 99% of prosecutions were instituted by the police rather than private individuals.[6] But, while the costs were socialized the procedure was not. There was no managerial regulation of the flow of cases. Each case was still brought one at a time as with private litigation.

The police had come to dominate the prosecution process. They were making the crucial decision as to whether to proceed or not; and they employed solicitors to prosecute their cases. The relationship between the English police and their retained prosecutors was the reverse of what developed in other industrial nations. Instead of public prosecutors reviewing and controlling the cases brought by the police, the police controlled the prosecutors, who operated as lawyers serving private clients.

Given the common law theory that police prosecutions were nothing other than private prosecutions, the police could not be forced to prosecute if they chose not to do so. The decision to invoke the costly and powerful machinery of justice was left up to them. Moreover, their guide was not the calculation of larger public priorities and needs but the vague and ambiguous notion of the demands of "the law". As Lord Denning M.R. put it in R. v. Metropolitan Police Commissioner ex p. Blackburn:

> "I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every Chief Constable, to enforce the laws of the land....He must decided whether or not suspected persons are to be prosecuted and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must , or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."[7]

The prosecution arrangements that developed were less than systematic. In 1981 the Royal Commission on Criminal Procedure reported that "the present arrangements for the prosecution of criminal offenses in England and Wales defy simple and unqualified description."[8] Indeed, the Commission deliberately refrained from describing them as a "system", since they were neither uniformly

organized nor did they rest on a single legislative foundation. It noted that each of forty-three separate police forces organized their own prosecutions.

The new system introduced by the 1985 Act was explicitly intended to bring greater rationality and legality to English prosecutions. Its primary aims are:

* to achieve superior efficiency and cost effectiveness;
* to achieve greater coherence of policy, consistency and fairness;
* to provide legal review of all prosecution cases before presentation in court;
* to allow the police to retain the primary law enforcement role; and
* to establish the independence of the Crown Prosecutors from the police.[9]

If adequately financed the new system will render the English prosecutions more fully socialized. Cases will still be "private" in form but now they must pass through a screening mechanism by which "the public interest" can operate to select those to be allowed to proceed through the court system. The law establishes the Crown Prosecution Service for England and Wales headed by the Director of Public Prosecutions (DPP) who is appointed by the Attorney General. It breaks the control over prosecutions which had come to be concentrated in the hands of the police. It does this in two ways. The Crown Prosecutors are independent of the control of the police; and, the decision to continue with the prosecution has been transferred to them.

Private individuals and the police may still initiate prosecutions but the Crown Prosecutors can take them over and terminate them.[10] Most importantly, in deciding whether to continue a case the new Prosecutors employ a higher standard of legal evidentiary proof than the traditional one.[11] Instead of the prima facie standard ("evidence, upon the basis of which, if it were accepted, a reasonable jury or magistrates's court would be justified in convicting"), they have adopted the "reasonable prospect of conviction"; and, they have supplemented it with a consideration of "the public interest" as developed at the DIP.[12]

The reasonable prospects test requires evidence which makes it more likely than not that a conviction will be returned. This criterion places the new Prosecutors squarely in the role of arbiters of the facts. It gives them substantial discretion in assessing the facts as to their sufficiency, (can the necessary quantity of facts be established?); their credibility, (are the facts believable?) and their persuasiveness (are they likely to be believed?).[13]

The public interest standard gives them even more discretion

and has raised questions about the legitimacy of lawyers applying "extra-legal" considerations in relation to prosecution decisions. The same kinds of questions that have been raised about the American public prosecutor have surfaced.[14] How can extra-legal considerations be justified? What should the criteria be? And, who should set these criteria? The answers are also familiar to the Anglo-American, common law tradition.

It is conceded that discretion must be used in the enforcement of laws; and that some official is needed to balance the different types of harm that might be done or avoided as the result of prosecutorial action or inaction. That is, the social character of the decision to prosecute has been fully recognized. An official has been established with the responsibility of balancing society's "net interest" in allowing its machinery of crime control to be fully engaged.

That role has fallen to the public prosecutor (rather than to the police or the judiciary) in England as in the United States apparently for similar structural reasons. The DIP like the American public prosecutor exercises quasi-judicial authority and is politically accountable (to Parliament through the Attorney General).[15] Moreover, prosecutors are strategically placed in the process. They are removed from the emotional intensity of the arrest and investigation. Thus they are better able to make coolly rational judgments. They are bureaucratically organized and therefore make possible the implementation of policies across volumes of cases. They are legally trained and hence are not only more committed to the rule of law but are suited to the process of decision-making.

Lastly, the task of weighing the strength of the evidence is not clearly separable from that of considering the public interest. For example, the same outcome may be reached either by considering the public interest or the strength of the evidence. A case might be dropped by one prosecutor because he thinks it is not in the public interest that the elderly offender be punished further and by different prosecutor because he thinks the evidence is weak because jury might sympathize with the old man. Thus, if an official is going to be charged with making the one type of decision, it will be difficult to prevent him from making the other.[16]

So far the English DIP has not fully articulated the public-interest criteria that will be used by his prosecutors. However, what has been expressed suggests that the criteria will be narrowly drawn and will not be notably dissimilar to those adopted in the United States by the American Bar Association and the National District Attorneys Association.

Although England produced two institutions, the King's Attorney General and the justice of the peace, which are believed

to have been the basis for the origin of the public prosecutor in America,[17] neither developed into an equivalent institution at home. The idea of a distinct, permanent public functionary whose duty it is to investigate allegations and to obtain and present evidence required to prove them as is done by the American district attorney, the French procureur de la Republique, or even the Scottish and Irish prosecutors never took hold in England.

The new legislation has altered the latter. It introduced a radical change in the process of prosecution and thereby established for the first time the possibility for state control of the flow and mix of cases prosecuted in the courts. The Act transferred a large part of the decision-making power in criminal prosecutions from the individual citizen or police prosecutor to the Crown Prosecution Service which is headed by the Director of Public Prosecutions and under the authority of the Attorney General.[18] In so doing, the Act has diverted the course of English prosecutions away from the traditionally "private" system of prosecution and toward the regulation the flow and mix of cases prosecuted in the courts.

The late arrival of prosecutorial management to the English system reflects both the strength of the commitment to private prosecution as well as the power of vested interests to resist change. For centuries the system has operated on the basis of "private" prosecution. The prosecution of offenses was "left to private persons or to public officers who act[ed] in their capacity of private persons and who hardly had any legal powers beyond those which belong to private persons".[19] The work of investigating, preparing, and presenting the case for prosecution fell upon the prosecutor, who until the advent of the modern police was a private citizen.

The move to rationalize the machinery of crime control in England began in the late eighteenth century. The rationalization of the machinery of crime control during the nineteenth century affected corrections and the police but did not extend to the management of prosecutions. Spitzer and Scull xxx (1977%: 279) are correct in noting that the general trend was toward creating a system which would work more uniformly, evenhandedly and with machinelike precision as was happening in the larger economy.[20]

The rise of imprisonment as the dominant response to crime did allow for the careful standardization of penalties, the exact calculation of the fit between the rewards and punishments of crime and an increasing emphasis on the certainty rather than the severity of punishment. The establishment of a full-time, professionalized police in 1829 and a professional detective branch of the police, the Criminal investigation Division (CID), in 1878 brought rational management to the patrol, investigative and apprehension functions. These innovations added to the certainty of punishment. The police and detectives were salaried and no

longer had to be paid by citizens to get up the evidence.

Even after the police assumed the costs of investigation and paid for the hiring of solicitors to prepare cases for trial the arrangements lacked the mechanisms of rational management and legal review by which public policies could be systematically implemented. By 1981 the great majority of prosecutions were being brought by the police. Yet, the Royal Commission on Criminal Procedure reported that "the present arrangements for the prosecution of criminal offenses in England and Wales defy simple and unqualified description."[21] Indeed, it deliberately refrained from describing the arrangements as a "system", since they were neither uniformly organized nor did they rest on a single legislative foundation. The Commission noted that each of forty-three separate police forces organized their own prosecutions.

B. Historical Origins

1. The Blood Feud and Compensation

The system of criminal prosecution in England began with the elements common to tribal societies and initially evolved in stages similar to those in early ancient Greece and Rome. Virtually all injuries were regarded as private disputes and were settled by blood-feuds between kinship groups. The first significant modification of this system was the creation of a system of compensations which occurred with two major changes: the shift from tribal to feudal mode of production between 400 and 600 A.D. and the conversion of the Anglo-Saxons to Christianity after King Aethelbert's marriage to a Christian woman in 597.[22]

With feudalism and Christianity, the blood-feud was replaced by the wer, wite, and bot. The wer or wergild was a money payment made to a family group if a member of that family were killed or in some other way injured. The bot was a general payment of compensation for injuries less than death. The wite was a public fine payable to a lord or king. The only other punishment was outlawry, whereby the outlaw could be slain by anyone without fear of reprisal.[23]

By Alfred's time (871) the feud could be resorted to only after compensation had been requested and refused. A law of Aethelred made it a breach of the king's peace to resort to the feud before demanding compensation.[24] Gradually, the kinship group was replaced by other groups with responsibility for avenging wrongs. As family ties were loosened or broken by migration, the king replaced the kindreds with the tithing. It represented a local mutual responsibility of freeholders arranged in little groups. Each of ten men stood as surety for one another. If one broke the law, the others would make good the harm. True punishments began to replace compensations. Nevertheless, on the eve of the Norman conquest, homicide could still be atoned for by

payment of the "wergild" and, if not paid, it was still up to the injured family to exact revenge.[25]

The administration of Anglo-Saxon justice was conducted by local courts which contained a body of twelve men who heard arguments, which committee later emerged as the petit jury. In these courts the responsibility for initiating trial rested with the injured party. There was no public prosecuting official. Proof was by compurgation or ordeal, the latter administered with the aid of a priest. There was no separation of lay and ecclesiastical courts.[26]

2. The Emergence of Criminal Law and Private Prosecution

With the Norman invasion and the reign of the Norman kings the old tribal-feudal system of law soon disappeared. By the reign of Henry II (1154-1189) a legal revolution was well underway. The system of compensation was replaced by the beginnings of a common law of crime. For the first time pleas were divided into civil and criminal. The concept of the King's peace extended to all persons and all places in England. Injuries to the persons or property of individuals were no longer seen as private wrongs but violations of the King's peace as well. By 1226 murderers could no longer prevent indictment and a sentence of death by paying compensation to the relatives of the victim. A new system of prosecution was emerging.[27]

This new system was not the proactive, "inquisitorial" procedure of the ancien regime with its public prosecutor, investigating magistrate, objective system of proofs, and tortured confessions. Rather it preserved the reactive, "private", accusatory procedure of earlier times modified by a socialized conception of crime, by an expanded use of the presentment grand jury to identify and accuse law breakers and profoundly affected by the development of a new system of proof, namely, the jury trial. Although the courts came under the centralized control of the king, criminal prosecution itself did not. The prosecution of offenses was "left to private persons or to public officers who act[ed] in their capacity of private persons and who hardly had any legal powers beyond those which belong to private persons".[28]

3. Presentment Grand Juries

Presentment or "grand" juries had existed in England before 1066[29] but the Normans increased their use. Norman kings had relied upon this method of general inquest in matters affecting their rights and revenues as well as to detect criminals. After the conquest, William used it to extract from his subjects the great fund of information compiled in the Doomesday Book. It also became the king's central means for keeping the peace and suppressing crime. Henry II (1154-89) was only confirming existing practice when he issued the Assize of Clarendon in 1166 establishing the

details of this jury of accusation. It provided that sheriffs and justices should make inquiry of

> "twelve of the more lawful men of the hundred and four of the more lawful men of each vill, under oath that they will say truly whether in their hundred or vill there be any man who is accused or generally suspected of being a robber or murderer or thief or any man who is a receiver of robbers or murderers or thieves...."[30]

The "presentments" of the grand jury were to be taken before justices sent to the counties from the king's household; and the justices were to put the suspected persons whom the sheriff had been able to arrest to the ordeal.

In principle the Assize of Clarendon did no more than reinforce the inclination common in earlier times and other places to regard simple bad reputation (mala fama) as sufficient grounds for trying a person. Although the assize says that the juries were to present "robbers and murderers", they were unable to do much more than identify notorious or suspicious persons. At best they could kept track of dead bodies; but they were incapable of enumerating all the specific crimes committed, as is evident from the records of the Shropshire assize of 1256.

The presenting juries there found that since the county had been last visited by the circuit court (eyre) eleven years earlier there had been 183 cases of homicide, 61 of accidental death, 3 of suicide and 2 of robbery. Certainly, if there had been 183 homicides there were probably many more than 3 robberies. They went unrecorded because law enforcement at the time was highly ineffective. The village constable and the hue and cry, the sheriff and his posse commitatus rarely caught even killers. Many a corpse was attributed by the juries to "unknown malefactors". Indeed, in only 37 instances was suspicion directed at individuals, often apparently because they fled.[31]

As for other crimes, the juries could not keep up with such passing misdeeds which left no solid evidence behind. Instead they relied on an approach which in principle is strikingly similar to that advocated by modern-day proponents of selective incarceration and career criminal programs.[32] They seemed to have assessed criminal guilt (or at least the quality of public dangerousness requiring punitive intervention) on the basis of the length of the criminal's career. Although only two actual deeds of robbery were presented, they indicted numerous people as notorious thieves. In ten instances the accused appeared and "put themselves upon the country" (asked for a jury trial). Six resulted in hangings.[33]

4. Private Prosecution

The presentment grand jury did not replace prosecution by

private individuals nor make it redundant. As we have seen the presentment grand jury was largely incapable of addressing separate criminal wrongs. The individual whose kinsman had been murdered or goods stolen and wanted some redress still had to resort to the primitive method of personal accusation used since Anglo-Saxon days and known by the misleading name of Appeal.

Out of the use of the Appeal three important distinctions arose: one between civil and criminal matters; another between felonies and misdemeanors; and the third among the various definitions of crimes which eventually emerged in the accusations. Unlike the developments in France where the injured party was allowed to use the criminal procedure to sue for damages, English law in the thirteenth century begins to say that private accusers (appellors) may not collect pecuniary damages. Moreover, they must make a criminal indictment, meaning they must allege a crime and offer to fight the accused person to prove it.[34]

The judges insisted that the appellor should describe the crime in specific detail and allege that it was a "felony", meaning that it was intrinsically horrible and demanded a horrible punishment enforced by the king. However, there was an alternative basis for prosecuting, one which greatly extended the range of acts considered crimes. This was the idea that many misdeeds, especially violent ones, although trivial in themselves, disturbed the king's peace and thereby constituted a form of trespass.

These lesser crimes became known as misdemeanors. They came to be included as lesser offenses within the charge of felony. Thus, judges might quash the charge of felony because the injuries were considered too trivial to constitute a felony, but a jury could subsequently find that the accused was guilty of a trespass against the king's peace and fine him. This new class of crimes below felonies included a large category of administrative crimes (e.g. violations of price regulations for bread and ale) as well as many private disputes. In the fourteenth century they were grouped as "criminal trespasses" and became the preoccupation of the justices of the peace.

By 1360 the normal procedure for prosecution was for justices of the peace to accept private accusations by petition which were then submitted to the grand jury. If the grand jury decided they were "true bills", trial proceeded as if they were old-style presentments. In contrast to Imperial Rome, France and the Italian city-states the government had not developed a means by which it could initiate criminal proceedings on its own authority. It could only encourage popular action.

By two centuries later it had experimented with two methods of remedying this weakness in its ability to control crime. One method was to authorize the justices of the peace to serve as public prosecutors, a practice which had developed on its own

before being legally established in 1555.[35] The other was to reinforce the system of private prosecutions by establishing financial incentives to encourage private initiative. Ultimately the latter method came to be the model for the control of crime in England. An elaborate system of rewards and fines (for failing to prosecute) developed in a futile attempt to make a system of private initiative operate for the general public security.

5. The Trial Jury and Its Impact on Prosecution

At first, a person denounced by a jury of presentment had to clear himself by ordeal. But when the Lateran Council of 1215 forbade clerical participation in judicial duels and ordeals, the main recourse of royal officials was to persuade or coerce the parties to agree to the use of the new procedure of trial by jury which had become the ordinary mode of proof in civil cases under Henry II.[36][37]

The development of the petit jury as a guilt-determining agency occurred during a period of experimentation which lasted into the thirteenth century. Initially, the grand jury took on the additional duty of testing its own accusations, of deciding whether the accused was guilty or innocent. But this was unacceptable because the jurors were unlikely to declare the accused innocent after having accused him. The first attempt to remedy this situation consisted of adding more jurors to the original presenting grand jury for the purpose of determining guilt. Finally, in 1350 a statute of Edward III[38] permitted the accused to challenge any member of the trial jury who had previously sat on the presentment jury. Thereafter, the idea that one jury should make the accusation and a second jury should decide the facts was settled. However, it took another 300 years for the details of the operation of the trial jury to be settled.[39]

Originally members of the trial jury were chosen because they were considered witnesses to the crime (although not necessarily eye-witnesses or even contemporaries). They were given advance notice of the questions that they were to answer and permitted to make their own inquiries in the neighborhood. They could be severely punished for perjury but it also seems they might be punished for refusing to testify under oath even if they were wholly ignorant about the matters involved. It was not until the sixteenth century that it had become expected that jurors would be ignorant of the crimes they determined.[40]

The development of the trial jury forestalled the emergence of public prosecutors in England until the sixteenth century when the trial jury no longer was self-informing. Until that time two of the tasks of prosecution--investigation or evidence gathering, and forensics or presenting evidence to the judgment-maker--were rendered unnecessary by the fact that the trial jurors already knew the facts of the case or inquired into them on their own. They did

not need an investigating magistrate or public prosecutor to inquire into the circumstances of the crime. However, as trial juries ceased making their own inquiries, the tasks of gathering and presenting the evidence were assumed by justices of the peace.

6. The Rejection of Roman-Canon Law

Why England invented the jury trial rather than adopt the Roman-Canon system of proof is of special relevance. Roman law was known to English authorities and was influencing English law at the time. Lanfranc, a teacher of law at Pavia became Archbishop of Canterbury and probably used his knowledge of Roman law to assist William the Conqueror in his legislative and administrative reorganization of the kingdom. The two most influential legal treatises of the era, Glanville's of 1187[41] and Bracton's of about seventy years later show a good knowledge of Roman law.[42] If these Roman influences had persisted in England, the inquisitorial system may have developed. However, the interests of the king and the barons converged to reject Roman law and allow English common law to develop along purely national lines.

In the middle of the twelfth century the Italian legal commentator, Vacarius, arrived in England and founded the law school at Oxford. The success of the school and the possibility that it might lead to the reception of Roman law as the law of the land frightened the king and the barons. The king feared the implication in Roman law that he might be subject to the sovereignty of the Holy Roman Empire. The barons feared that Roman law provided a foundation for royal absolutism. Hence, King Stephen forbade Vacarius to teach at Oxford, and in 1234 Henry III forbade the teaching of Roman law in London. Two years later on the occasion of rejecting a proposal to adopt the Roman law on illegitimacy, the barons gathered at Merton declared they "did not want to change the laws of England".[43]

7. Public Prosecutors: Attorneys General and Justices of the Peace

In English history until 1879 there were only officials who answered in any degree to the description of a public prosecutor. The one usually cited in the literature is the Attorney General.[44] The other, whose prosecutorial role has only recently been fully identified, is the justice of the peace.[45] This office is of unknown origin but must have existed from the earliest time when counsel were employed at all the courts of justice. In early times there was little for the Crown Counsel to do in criminal trials.

Langbein has developed the observation of Stephen that the justices of the peace "may be regarded as having for some centuries discharged more or less efficiently and completely the duties which in other countries are imposed upon public prosecutors."[46] Langbein

argues that the American public prosecutor is a descendant of this officer.

By the end of the reign of Henry II (1154-1189) the law of England was in the hands of the Crown. A court of "common law" was established for the justice of all men. Using a system of writs by which cases could be removed from the baronial courts into the king's courts, the king had gained control of the administration of justice. Much earlier than in France feudal justice was absorbed and replaced by royal justice.

Over the next 700 years England never developed the concept of "public" prosecutions in the forms taken on the Continent, in the United States or even in Scotland and Ireland. That is, there never developed a distinct, permanent public functionary whose duty it was to investigate the charges and to obtain and arrange the evidence required to support them as is done by the public prosecutors in other countries.

For centuries, however, the English justices of the peace served these functions.[47] In 1555 they were given official responsibility for doing so by Parliament.[48]as been an expansion of the "domain" of that office. The American public prosecutor has assumed partial or full control of tasks which were once performed by other institutions in that long-linked organization of agencies and procedures that constitute the justice industry.[49] Among the most important of these are: the screening function formerly served by police, preliminary hearings or grand juries; and the adjudication and sentencing functions which continue to be officially determined by judges and petit juries.

The emergence of the system-managing, policymaking role of the modern public prosecutor has not occurred everywhere at the same time. In the United States it is most fully developed in large jurisdictions where the sheer size of the prosecutor's office requires and permits a formal, managerial approach to operations. It can be seen in various stages of development in other jurisdictions that have experienced rapid increases in population and crime rates. It exists in its core elements in small jurisdictions where caseloads are light but the majority of dispositions are nevertheless the result of plea negotiations or dismissals.

The consolidation of so much power in one governmental official with such broad discretion has not gone without protest and efforts to check it. Ironically, one source of protest has been the police. They have resisted the reduction of their influence over the case acceptance process. Other objections have been of the more liberal kind. They have been concerned about the potential abuse of power, the apparent shift in the balance of advantage between state and the accused, and the lack of an impartial and thorough guilt-determining mechanism. Still others have been concerned about the underenforcement of the law.

Various strategies for controlling prosecutorial power have been proposed or enacted. Few have met with much success. Two old institutions, the preliminary hearing and the grand jury, have been used with mixed results. Legislative efforts to eliminate prosecutorial discretion regarding specific decisions, such as the filing of habitual offender charges, have been ignored totally. Other legislative attempts to eliminate the prosecutor's power to dismiss (the "nolle prosequi") or the practice of plea bargaining have either failed[50] or been counterproductive resulting in an increase in prosecutorial power.[51]

Efforts to increase judicial supervision of prosecutorial decisions have met with greater formal success but doubtful substantive value. The entry of negotiated guilty pleas is now accompanied by a lengthy judicial inquiry into the knowing and "voluntary" nature of the plea and the factual circumstances supporting it. But, this procedure is more a ratification of the prosecutor's decisions than an independent reappraisal of the merits of the case[52]. Moreover, in at least one jurisdiction the additional court time required by this judicial inquiry has resulted in extensive reliance on an even faster informal mechanism for disposing of cases.[53]

Another approach to the control of discretion has been internal policy guidelines. Among the leading advocates for this has been Professor Kenneth Culp Davis[54] who has applied the logic of administrative law to the business of prosecution. He recommended that prosecutors establish rules guiding the discretion in their offices. This has been done in some offices as part of an attempt to target resources and achieve managerial control over decisionmaking. The focus of these policies have varied from case acceptance standards to criteria for career criminal prosecutions to the control of plea negotiations.

One of the most publicized and fully documented policies was the Alaska Attorney General's attempt in 1976 to eliminate plea bargaining. The history of that policy is an interesting case study in the dynamics of prosecutorial power and policy control.

Concern about prosecutorial discretion has also led to a renewed interest in Continental prosecution systems. Professor Davis has drawn attention to the West German system not to propose transferring European attitudes to the United States but "because Americans need to realize that the assumptions on which our system is built are not inevitable."[55] Other comparativists have also urged a consideration of "inquisitorial" systems as possible models for American prosecution.[56] Of particular interest are claims about: the continental prosecutor's limited discretion; the continental system's ability to dispose of caseloads without resort to plea negotiations; and the judicial supervision of the investigation process, especially the role of the investigating

magistrate.

Today efforts are being made to render the American public prosecutor's office even more technologically and organizationally efficient. Career criminal programs, early case screening, and diversion programs as well as police-prosecutor task forces, computerized records management, artificial intelligence and other efforts are being tried. These efforts tend to have a narrow, issue-specific focus. Similarly, discussions about plea negotiation, charging, and prosecutorial power tend to be detached from any larger view of the prosecution function, its historical development or its relationship to other aspects of the society in which it is located.

Endnotes

1. Fielding, 1902: 371-72.

2. Quoted in Kurland and Waters, 1959: 495. The parenthetical remark is Kurland and Waters's. They add that at the time of the editorial the borough magistrates' clerks were not acting in that capacity; but that the Law Times frequently and violently condemned the practice "of magistrates's clerks acting as attorneys against such persons as are committed by the magistrates for whom they act" (fn.10).

3. Spitzer and Scull, 1977.

4. 243 Hansard 1108 (1879). Quoted in Kurland and Waters, 1959: 551.

5. Jackson, 1940: 112.

6. Saunders, 1985: 5.

7. R. v. Metropolitan Police Commissioner ex parte Blackburn 2 W.L.R. 893 (1968).

8. Royal Commission on Criminal Procedure, 1981: para. 6.1.

9. Anonymous, 1986%: 1.

10. Prosecution of Offenses Act, 1985, Sec. 6.

11. The use of a more stringent evidentiary standard was recommended by the Royal Commission on Criminal Procedure in a move reminiscent of the recommendations of certain crime commissions in the United States in the 1920s. See for example the Cleveland Crime Survey, 1922: 209.

12. Royal Commission on Criminal Procedure, 1981: para. 8.8.

13. Mansfield and Peay, 1987: 12.

14. McDonald, 1979.

15. Mansfield and Peay, 1987: 27ff.

16. This point underlies the contention of observers who claim that Continental prosecutors in inquisitorial systems a good deal more discretion than the official view admits (Goldstein and Marcus, 1977). The official view is that they only exercise professional judgments about evidentiary strength.

17. Kress, 1976; Langbein, 1973.

18. Prosecution of Offenses Act, 1985, Sec.1-3.

19. Stephen, 1883: 218.

20. Spitzer and Scull, 1977: 279.

21. Royal Commission on Criminal Procedure, 1981: para. 6.1.

22. Jeffrey, 1969.

23. Jeffrey, 1969: 20.

24. Aethelred IV.4 cited in Jeffrey, 1969: 20.

25. Jeffrey, 1969: 18ff.

26. Jeffrey, 1969: 23.

27. Jeffrey, 1969.

28. Stephen, 1883: 218.

29. Dawson, 1960: 121.

30. Quoted in Dawson, 1960: 121.

31. Harding, 1966: 60.

32. See e.g. Greenwood and Abrahamse, 1982; Moore et al., 1984.

33. Harding, 1966: 61.

34. Harding, 1966: 62.

35. Langbein, 1973: 320.

36. Ploscowe, 1935: 446; Dawson, 1960: 121. During the time of Henry II a defendant was allowed the alternative of a jury trial or trial by battle. Many refused to accept a jury trial because if they were convicted.

37. The ordeal was not formally abolished in England until the Thornton case in 1818, in which the defendant used it (Jeffrey, 1969: 27).

38. 25 Edward III, St. 5, c. 3 (1350).

39. Holdsworth, 1956: 324-25.

40. Dawson, 1960: 125; Langbein, 1973: 315.

41. A Treatise on the Laws and Customs of England.

42. Cappelletti et al., 1967: 33.

43. Cappelletti et al., 1967: 33.

44. Stephen, 1883: 501.

45. Langbein, 1973.

46. Stephen, 1883: 497.

47. Stephen notes that when trial juries ceased to be self-informing, there was no direct express move to provide for the collection of evidence and presentation to the new trial jury. However, he says the appointment of justices of the peace might be regarded as filling that gap. "Justices [of the peace] did no doubt concern themselves with the detection and apprehension of offenders and the collection of evidence against them to a greater extent and down to a later period than is commonly known, and to that extent they may be regarded as having for some centuries discharged more or less efficiently and completely the duties which in other countries are imposed upon public prosecutors. By degrees, however, their position became that of preliminary judges, and the duties which they had originally discharged devolved upon the police, who have never been intrusted with any special powers of the purpose of discharging them" (Stephen, 1883: 497).

2 and 3 Philip and Mary, c.10 (1555). Cited in Langbein, 1973: 320

49. McDonald, 1979.

50. Baker and DeLong, 1934-35.

51. McCoy and Tillman, 1985; McCoy, 1984.

52. McDonald, 1985.

53. See the discussion of the not-guilty statement of facts procedure in Maryland in McDonald, 1985.

54. Davis, 1969; and Davis, 1976.

55. Davis, 1969: 191.

56. Weigand, 1980.

Chapter 4

Criminal Prosecution Systems

> One cannot understand the working of present forms of legal life unless one has studied the process to some extent in organisms that are now defunct and moribund.
>
> P. Devlin[1]

The study of evolution of law has venerable place in sociolegal scholarship for good reason. It provides an opportunity to trace the differentiation of institutions and to examine the relations between law and other aspects of society. Early scholars focused on it and contemporaries have returned to it.

These studies have concerned mostly the development of legal norms and not the evolution of legal organization. Exceptions are studies of police[2] and corrections.[3] Prosecution systems by themselves have not attracted much attention; but aspects of them can be found in studies with other foci. From these we can identify issues and sketch outlines of prosecution systems in other times and places.

Conducting such a survey presents real conceptual difficulties that must be addressed. The problem is to find a way to handle the complexity of the subject and the ambiguity of language. We have attempted to do this identifying the essence of the prosecution function; by examining three dimensions of it: 1) its conception of crime; 2) the tasks and institutions that compose it; and 3) its social organization; and by classifying the institutions of prosecution into a conceptual scheme that highlights the distinction between modern and premodern systems of prosecution.

I. The Prosecution/Law Enforcement Function

Specifying the nature of prosecution is not as easy as it may seem. Organizations called prosecutors perform different functions in different countries; different organizations in the same country carry out prosecution tasks; prosecution units handle non-prosecution duties just as prosecution tasks are handled by non-prosecution personnel. If comparative and historical research on prosecution systems is to succeed, then this tangle of disparate and imprecise language must be overcome. It is essential to delineate a central focus for this line of inquiry; and, it is important to distinguish it from a parallel and closely-related pursuit, studies of the development of the police.

A useful start is with two thoughtful definitions of the police idea. David Bayley defines the core of "police" activity as synonymous with "the mandate to regulate interpersonal relations

within a community through the application of coercive sanctions authorized in the name of the community. A police force is an organization authorized by a collectivity to regulate social relations within itself by utilizing, if need be, physical force."[4] He emphasizes that the word police should be understood in terms of a particular function rather than a given body of people.

However, Bayley's definition is too broad. It makes the police hardly distinguishable from Weber's definition of an entire legal order. This can be rectified if one adds to the definition Egon Bitner's views. Bitner agrees that the use of force by someone with the general right to do so is a part of the police idea; but, he gives an important qualifier. What makes the police "the police" and not the entire legal system is that their use of force is situationally specific. The police are those persons authorized to use force to accomplish some community sanctioned goal <u>on the spot</u>! That is, physical coercion is a sanctioned means available to them to accomplish their work in situations requiring immediate recourse to force--such as restoring order, making arrests, or recovering evidence.[5]

The situational application of force, however, is only one type of circumstance in which communities regulate interpersonal relations with coercive sanctions. There is also the more deliberate infliction of penal sanctions following the determination by some judgment mechanism that an important social norm has been transgressed. The prosecution function is always linked to this more deliberate application of force whereas the police function is not.

The prosecution function consists of mobilizing the community's mechanism for judging alleged violations of those social norms for which physical sanctions may apply. The essential component of any mobilization is the making of an accusation that someone has transgressed some coercively sanctionable norm. In simpler communities an accusation may be all that is needed to mobilize the judgment process. The accused may thereby be required to immediately undertake some oath or ordeal to try to exonerate him/herself or otherwise remove him/herself from the community.

The more complex the society, the more complex and onerous the task of mobilizing the judgment mechanism becomes. It involves not just making an accusation but also supporting it before the judgment finders. This may involve nothing more than arguing one's charges to the judgment finders--as in the ancient Athenian courts. Or, it may involve an enormous undertaking consisting of the collection and analysis of evidence, the production and examination of witnesses and the accused in court, the filing of particular legal documents, and the use of legal experts to argue the case--as in modern Western courts.

Thus, a prosecutor or a prosecution system is a person,

organization or set of organizations authorized by a collectivity to regulate social relations within itself by mobilizing that collectivity's judgment mechanism. Such mobilization may involve the use of socially approved coercive force in the bringing of the case to judgment.

When the idea of prosecution is referred to it should be understood in terms of a particular function and not in terms of a given body of people. But, it should be recognized also that this general function can be subdivided into distinct tasks which in more advanced societies are indeed performed by persons and organizations other than an officially designated body of prosecutors--the police, for example, as will be shown below.

It is now possible to state the relationship between the so-called "police function" and the prosecution function. They are not co-terminus. Police bodies may use force to accomplish situationally specific goals. One of those goals may be to assist in the task of prosecution, i.e., of mobilizing the community's judgment mechanism. But, frequently the goal of the use of force by police bodies is simply to restore order without invoking the formal judgment of the community.

This distinction is recognized in the police literature, i.e., the division between "order maintenance" and "law enforcement". Unfortunately, this has done as much to confuse as to clarify. Bitner is right. The center of gravity of the police work lies in the order maintenance. What needs to be recognized, however, is that all of those police activities related to informing the judgement of the courts are part of prosecution work--which is being done by the police. Together those activities of police, prosecutors and anyone else involved in engaging and servicing the judgment mechanism of the community constitute the "law enforcement" function in society.

Perhaps it is obvious by this point that Bayley's injunction to focus on functions rather than on particular bodies of people in comparative analyses can not be followed easily. (Indeed, strictly speaking, he did not follow his own advice.) The problem is that general social functions often involve several tasks. All of those tasks may be performed by one body of people or they may be handled by several distinct bodies (in different societies or in the same society at different times).

If function and organization are to be kept distinct, then it would be clearer to drop all references to "the police function". Instead there are two functions: order maintenance and law enforcement/prosecution. Organizations that are called "police" are distinguished by the fact that they are authorized by the community to use situationally specific force constitute the primary if not exclusive agents of maintaining order. Part of their work involves law enforcement function which is synonymous

with the prosecution function.

In modern societies the term, "prosecutors," has assumed a deceptively narrow reference, namely, the lawyers in the office of the public prosecutor. Truth is, a lot more people are involved: the police, grand juries, private citizens acting as complainants and witnesses, and forensic scientists. Assistant public prosecutors are to prosecution what pilots are to airline travel.

The distinctive feature of prosecution is not the use of force--that is done by "police" agents. It is management. Successful prosecution requires the coordination of a series of activities: from making an accusation to assembling evidence, to arranging for witnesses and presenting the case. If the general function is to mobilize the courts, the specific talent involves organization. In other words, at the core of the prosecution function lies the job that modern bureaucracies do best, namely coordinating, managing and scheduling the disparate activities of various actors.

By a "prosecution system" we mean those institutions which a given society has developed for enforcing the law. More precisely, we refer to that complex of ideas and activities involved in accusing someone of a crime, and managing the submitting of the proof to a judgement mechanism.

II. Dimensions of Prosecution Systems

A. The Conception of Crime

The most fundamental dimension of a prosecution system is its conception of crime. Early ancient and simple societies did not distinguish between "crimes" (wrongs regarded as offenses against the whole community) and "torts" or "civil wrongs" (regarded as injuries between private individuals). All wrongs were considered private matters and their prosecution was left to the injured individuals and their families. The concept of "crime" emerged slowly as the notion of private vengeance was gradually replaced by the principle that in some instances the community was also injured when harm came to its members. Eventually, the right of action arising from a wrong ceased to be restricted to the immediate victim or his kin and was granted in an ever-increasing number of offenses to all citizens or to the politically organized society.

In brief, "true criminal law" emerged, which, as Calhoun notes, is distinguished from primitive tort law by several new legal concepts:

> "(1) It will recognize the principle that attacks upon the persons or property of individuals or rights thereto annexed, as well as offenses that affect the state directly, may be

violations of the public peace and good order. (2) It will provide, as part of the ordinary machinery of government, means by which such violations may be punished by and for the state, and not merely by the individual who may be directly affected. (3) The protection it offers will be readily available to the entire body politic, and not restricted to particular groups or classes of citizens."[6]

Early ancient and simple societies did not lack completely a conception of harm to the group. They did respond to acts threatening their collective well-being. But they did not consciously formulate a theory of law rationalizing their response.

For instance, Lowie describes how among the essentially egalitarian Plains societies of the American West wrongs among members were treated as torts. In contrast, premature attacks on the buffalo herd were treated as threats to the entire community. But note the inarticulate rationalization of their action.

> [E]verywhere the basic idea [was] that during the hunt a group is vested with the power forcibly to prevent premature attacks on the herd and to punish offenders by corporal punishment, by confiscation of the game illegally secured, by destruction of their property generally, and in extreme cases by killing them...If, for example, a man had been murdered by another, the official peacemakers of the tribe--often identical with the buffalo police--were primarily concerned with pacifying the victim's kin rather than with meting out just punishment. There was thus a groping sentiment on behalf of territorial cohesion and against internecine strife. But there was no feeling that any impartial authority seated above the parties to the feud had been outraged and demanded penance or penalty. In juridical terminology, even homicide was a tort, not a crime. But with transgressions of the hunting regulations it was otherwise: they were treated as an attempt against the public, in short as a criminal act, and they were punished with all the rigor appropriate to political offenses.[7]

There is a long way between the rudimentary idea of a public interest in protecting against premature attacks on buffaloes and a full-blown theory of law whereby private wrongs are considered offenses against the community. The evolution begins with the recognition that some private harms have larger implications. It grows with the continual expansion of specific acts redefined as no longer merely private. It matures with general concepts about the public peace and the public morality which in Western societies must be protected even against immoral acts between consenting adults in private.

It is not possible to identify the precise moments when this conception of crime was achieved in particular societies. But, certain events reflect critical advances. They suggest that

the development of the concept of crime and the related apparatus of prosecution is shaped by changing economic and political conditions. The power to prosecute for crime, to subject someone to the judgment and coercive force of the community is a weapon of profound political power. Changes in the way in which that power is distributed in society reflects the changing fortunes of competing interest groups as well as more fundamental shifts in economic and political structures. Sometimes the results represent a compromise of conflicting interests; othertimes they reflect complete victories for one side. Occasionally, the least powerful segments of the society benefit from innovations.

B. Institutions of Prosecution

1. Institutions of Initiation

Once societies begin replacing self-help with governmental methods of prosecution a variety of institutions and procedures arise. With changes in economic and political conditions, the responsibility for these tasks shifts. New institutions appear; old ones fade; some are revitalized; others assume new responsibilities. Thus, it is best to identify the underlying tasks and only mention some sample institutions.

One obvious task is the discovery of offenders. This is distinguished from the investigation of known crimes. The former is to learn who has committed what crimes; the latter, to gather proof necessary to convict. Various institutions for discovery have been used. The oldest is simply for the individual victim to accuse the offender. But this approach has serious limitations.

It does not work well when segments of the population are denied the legal right to make accusations; or, when the costs and risks to the accuser are high (as, for example, when failure to convict results in the accuser being punished or when the accuser is further humiliated by the experience of prosecution or has to pay high fees to law enforcement and judicial officials). Also, it does not work well for certain types of crimes, notably, crimes that have no complaining victim such as sumptuary offenses, witchcraft, crimes against morality and crimes against the state such a sedition or revolution.

Communities and governments concerned about high rates of crime or intent upon closer regulation of the people seek ways of improving upon private accusation. One method is to remove restrictions on the right to prosecute. Another is to establish rewards for successful prosecution or penalties for not prosecuting. A third is to protect the accuser from the risks of unsuccessful prosecutions (e.g., by allowing them to merely denounce the offender to a magistrate who then makes inquiries which may lead to trial). A fourth is to establish some kind of public official or body with the power to make inquiries and

accusations on behalf of the community (such as a public prosecutor, or a presentment grand jury).

The task of investigation is sometimes congruent with that of discovery (as, for example, in cases where the offender is caught in flagrante delicto and punished summarily). But other times separate institutions for gathering proof are involved. Again, the burden may rest entirely upon the individual victim or may be assumed wholly or in part by the state (through investigating magistrates at inquests or hearings or through torture, or by public prosecutors, police, or investigating grand juries).

In addition to identifying offenders and compiling proof, there is a formal accusation whereby the offender is notified however belatedly or vaguely of the charges against him. This may be done orally or in writing; and may consist of a specially-named instrument such as a complaint, information or indictment.

Then evidence is submitted to some judgment mechanism. The determination of guilt can be thought of as one example of the general phenomenon of legal decision-making. Other examples include all the decisions related to prosecution such as making the initial complaint, indicting, dismissing and plea bargaining. All legal decision-making methods vary according to Weber along two important dimensions: formality and rationality.[8]

By rationality he means the presence or absence of general rules as a means of deciding the outcomes of cases. That is, the legal decision must be guided by "explicit, abstract, intellectually calculable rules and procedures [instead of]...sentiment, tradition, and rule of thumb"[9] Thus the determination of guilt through the ordeals or the judicial duel of the Middle Ages which supposedly invoked divine intervention was not "rational". Similarly, the decisions of modern American juries are not "rational" because the individual jurors rely entirely upon personal insight to arrive at their conclusions. In sharp contrast, the continental law of proof that replaced the ordeals represented the ultimate in rationality. Each item of proof was assigned a precise probative value. (Get details)

By formality Weber refers to the existence of an autonomous system for deciding legal issues. If decisions are made by distinctly legal procedures, the system is formal. If the decision is made on extralegal grounds (political, moral, economic), the procedure is "informal" or "substantive". Thus a conviction based on the continental law of proof would represent a formal decision because it would be based on a set of rules that were intrinsic to the legal system. The doctrine of proof had been developed by legal thinkers solely for that purpose. On the other hand, a case dismissed or reduced by a prosecutor because of court backlogs or in order to protect the victim from further trauma or because the penalty was too severe would represent a substantive decision.

Such decisions reflect bureaucratic and equitable considerations not uniquely legal principles.

Combining the two dimensions of rationality and formality yields four basic types of legal procedure (substantive irrational, formal irrational, substantive rational, and formal rational) which are useful categories for comparing prosecution systems. Substantive irrational systems are probably the oldest of all. They are illustrated by the earliest forms of private revenge wherein the victim chose to seek vengeance or not based on considerations of expediency or other non-legal factors.

2. Institutions of Restraint

The power to prosecute is so formidable a weapon that societies have had to develop ways of restraining its use. Abuse of this power is a recurring problem. One early restraint was the principle of lex talionis. If the prosecutor failed to convict, he was subject to the punishment that would have been inflicted on the accused. Other measures that have developed include: preliminary reviews of the sufficiency of the evidence by a magistrate or grand jury, the law of evidence (e.g., the medieval legal proofs in the continental systems whereby the weight to be attached to each type of evidence was established by law); a system of appeals; and modern codes of professional ethics.

Authoritarian governments where the right to prosecute has been monopolized by the state are, of course, unconcerned about restraining that power. Liberal societies on the other hand have evolved procedural rules and guarantees designed to restrain the prosecution in an increasing number of ways. Among these are the right to timely notice of the specific charges; the right to confront the witnesses against you (conversely, the prohibition of secret accusations); the right to counsel; and the right of appeal.

C. Social Organization

Four aspects of the ways in which societies have organized their prosecution systems merit special interest. The traditional division is between accusatorial and inquisitorial systems. But three other distinctions deserve separate attention, namely, the distinction between private and public prosecution; whether or not a monetary incentive is involved; and if involved, whether it operates on an ad hoc, piecework basis or whether it is paid as a salary to bureaucratic officials.

1. Accusatorial vs Inquisitorial Systems

The literature on the difference between the accusatorial and the inquisitorial modes of organizing criminal prosecution is confusing. It attempts to do too much with too little. It tries to cram into these two terms both a history of the evolution of

criminal prosecution systems as well as an account of the major differences between them. It mixes abstract models with concrete instances thereby conflating a multidimensional conceptual problem into one dimension--which happens to be the wrong dimension, according to Professor Damaska.

We will try to unravel the confusion by identifying the essential difference between the two models. We will then show that for purposes of sketching general history it is more useful to focus upon whether the institution of prosecution is public or private and what the incentive structure is, particularly whether the system has been organized bureaucratically and officials paid salaries rather than fees. Indeed the "inquisitorial-accusatorial" distinction is an endangered species as Italy and other traditionally "inquisitorial" systems move toward full accusatorial principles.

In his treatise on Continental criminal procedure, Professor Adhemar Esmein distinguishes the ways in which prosecution has been organized and suggests the direction of change:

> The history of civilization, in its organization and procedure for the repression of crime, presents a limited number of variant types. These succeed each other in a chronological order corresponding very closely to the logical order in their appearance. Three fundamental types of procedure are: the accusatory type, the inquisitorial type, and the mixed type. The criminal law of almost every nation has begun with the accusatory procedure, and has changed to the inquisitorial procedure. An evolution in an opposite direction, however, is now apparent; everywhere these is a tendency to restore the essential safeguards of the accusatory system, publicity and confrontation. The only institution of the inquisitorial system which has defied criticism and which is probably more powerful and general than ever is that of the public prosecutor.[1011]

Esmein and others distinguish the accusatorial and inquisitorial systems via models which highlight essential features that may not fit exactly any given instance of the phenomenon in the real world. Unfortunately these efforts are not consistently abstract. They include features which tie the models to particular times or places thereby reducing their utility.

For Esmein the accusatory system (by which he seems to mean the earliest kinds of accusatory system) is based on the following principles. 1) The accusation is freely exercised by every citizen. 2) There is no penal action without an accuser who takes the initiative in it and the responsibility for it. 3) The parties to the action must personally confront each other at a 4) public forum. 5) The judge can not proceed on his own initiative, either in taking jurisdiction or in obtaining proof. He is an umpire of

a personal combat. 6) The normal method of proof is that of taking an exculpatory oath supported by a number of other oath-helpers.

In contrast the inquisitorial system is characterized by the following. 1) The detection and prosecution of criminals are no longer left to the initiative of private parties. The state performs these duties "ex officio". 2) The judge is no longer any layman chosen as an arbiter, but a professional legist representing a ruler. 3) The judge's investigation is not limited to the evidence presented to him. He may proceed on his own accord with an inquiry, which includes any search for evidence allowed by law. 4) This inquiry is written and 5) secret and 6) employs torture.

More recently, Conso has given an updated but nevertheless insufficiently abstract version of the difference. The typical accusatorial system is characterized by: 1) the accusation must be proposed and sustained by someone other than the judge; 2) the entire proceedings must be public; and hence 3) oral; 4) there must be absolute parity of rights and powers between the accuser and the accused; 5) the judge has no freedom to gather evidence of any kind; 6) submission of evidence is by the accuser and the accused; 7) and the personal freedom of the accused is irrevocable until sentencing. In contrast, the inquisitorial system is characterized in the extreme by: 1) intervention ex officio by the judge; 2) secrecy of the proceedings both in regard to the general public and the accused; 3) complete freedom for the judge to collect evidence; 4) no right for the accused to produce evidence; and 5) preventive detention at the discretion of the judge.[12]

Other writers single out one crucial difference between the models. Glanville Williams states that "[i]f the terms 'accusatorial' and 'inquisitorial' must be used, it seems clearest to say that they refer only to the mode in which evidence is elicited, and that the single characteristic of an inquisitorial system is the activity of the judge in questioning the defendant and witnesses."[13] Goldstein and Marcus agree but define it more broadly:

> We use the term, 'inquisitorial', to describe a system in which the state, rather than the parties, has the overriding responsibility for eliciting the facts of the crime. In its pure form, the judge discharges that responsibility both before and at trial. There are many variations. For example, the public prosecutor may substitute for or share with the judge the responsibility for pretrial investigation. But everywhere the judge is expected to carry the factfinding initiative at trial, using the file (dossier) prepared during the pretrial investigation by an examining judge (or magistrate) or public prosecutor.[14]

One of the main sources of confusion with all these efforts

has been the use of the terms, "accusatorial" and "inquisitorial", as synonyms for the Anglo-American, adversarial, "party"-based system and the Continental, judge-centered system of the "civil law"[15] countries of modern Europe. But, both systems are mixed types[16]; and because of the mix, the essential differences are unclear.

Professor Damaska has provided some clarification by turning the discussion around. He argues that if one wants to compare the continental and the Anglo-American prosecution systems one should not focus on procedural details. They do not adequately reflect the more fundamental differences between the two systems. The crucial differences lie in how each system structures authority.[17]

He outlines two models of how the administration of justice is organized. They reflect differences in underlying values and legal cultural traditions. The "hierarchical" model typical of the continental systems places a high premium on certainty in decisionmaking. It is willing even to sacrifice the individualization of justice to this goal when forced to choose. This preference naturally leads to the centralization of authority, the precise delineation of offices, a hierarchical ordering of positions; an emphasis on uniform policies and a minimum of discretion. In short, it leads to bureaucratic or as Weber called it "legal rational" organization.

In contrast, the "coordinate" model typical of the Anglo-American systems places less value on certainty and more on individualizing justice to the circumstances of the particular case. Thus while it is recognized that some uniformity of policies is necessary and some coordination required, the emphasis is upon allowing officials as much autonomy as possible. Roles and powers are not as clearly defined and often overlap. Discretion is not rigidly controlled. Formalism is kept to a minimum.

Recent changes in continental criminal procedure illustrate the limitations of facile references to "inquisitorial" and "accusatorial" systems and the need for an analytic approach such as Damaska's.[18] As Esmein predicted, there has been a movement away from "inquisitorial" procedure and the public prosecutor has become increasingly important. The investigating magistrate, whose responsibility it was to inquire into the facts and compile the dossier upon which the trial was based and who represented the central symbol of the inquisitorial system, has been eliminated from several continental systems (West Germany, Italy, and Spain).

Even more dramatic is the fact that Italy has enacted a new code of criminal procedure that makes its system largely accusatorial.[19] Under the new code the judge at trial is no longer expected to carry the factfinding initiative and is no longer confined by a dossier developed by an investigating magistrate (who no longer exists). The new trial process is public, oral and

adversarial. The pretrial investigation is now wholly the responsibility of the public prosecutor and police. Spain is considering adopting the Italian innovations.

These changes underscore the value of Damaska's approach and the antiquated nature of the old division into "inquisitorial" and "accusatorial" systems. Continental countries may adopt accusatorial procedures but their underlying cultural traditions will give a distinct shape to the revised administration of justice. Accusatorial systems operated by such countries are likely to differ in important ways from accusatorial systems operated in common law countries.[20] Future comparisons between them will require models like Damaska's to make sense of the differences.

We shall use the accusatorial-inquisitorial distinction in its generic sense of distinguishing between prosecutions brought by private individuals who alone have the right to initiate charges and produce evidence as opposed to prosecutions where the state has the authority to initiate investigations, file charges and elicit evidence without waiting for a private party to act, respectively. Our use of the distinction maintains continuity with tradition but focuses on what we regard as the most significant aspect of this difference, namely, the historical shift in power of the state relative to the people. The change to inquisitorial or proactive forms of prosecution reflect significant increases in state power.

2. Public vs Private Prosecution: Agents, Fees and Salaries

Another confusing distinction is the common reference to prosecutions as being either "private" or "public". This is often conflated with the accusatorial-inquisitorial distinction. But it merits separate treatment.

It may be useful shorthand (although not wholly accurate) to say that the earliest prosecution systems were accusatorial and "private" (in the sense that they relied upon victims or their kin to initiate criminal charges) and that an important change occurred when they became inquisitorial and "public" (in the sense that the state assumed the right to seek out criminals). But further use of these terms as being synonymous is confounding, as a quick look at actual systems suggests.

Accusatorial systems may preserve the legal theory that prosecutions are "private" as in England today but as Williams notes such prosecutions are paid for by public money and thus are not really "private".[21] In the United States today with its accusatorial system, the work of prosecution is done by salaried police and public prosecutors. Yet, thirty-two states continue to allow private citizens to bring private prosecutions at their own expense.

Also, inquisitorial systems have had strong "private" elements. They have allowed for a procedure known as the partie civile which permits private parties to attach a civil suit to the public criminal prosecution. In 16th century France when this institution was emerging many criminal prosecutions were brought by private parties solely to obtain the civil judgments. Indeed, the government relied upon this as a cheap form of law enforcement (described below). These procedures still exist and they result in one of the ironies of legal classification. Inquisitorial systems, which are supposedly "public", are the ones that preserved the private party's official standing in the case as an interested third-party and not simply as a witness. In contrast, accusatorial systems, which in theory are "private", have eliminated the victim's rights and interests in the case once it has entered the courts.[22]

Although the public/private distinction is regarded as theoretically important, it has been not been adequately conceptualized. There is no tidy solution to this. But three dimensions of the phenomenon can been usefully distinguished: the agent of prosecution; the incentive system; and whether the incentives operate piecemeal or on a salaried, bureaucratic basis.

We will regard prosecution as private if the agent of it consists of one or more individuals who do not hold a governmental responsibility for law enforcement. Thus, victims, their kin, witnesses, other private citizens acting either out of civic responsibility or for private profit such as professional thief-takers and bounty-hunters, vigilantes, and organized prosecution societies are all private agents. In contrast, citizens responding to the 'hue and cry', presentment grand juries, constables, justices of the peace, elected presenters, investigating magistrates, public prosecutors and the police are all "public" agents of prosecution.

If the nature of the agent of prosecution is cross-classified with our other criteria (whether a monetary incentive exists and, if so, whether it is a fee system or a bureaucracy with wages and salaries) interesting patterns occur. With these one can clarify the meaning of "public vs. private" while sketching in broad strokes major changes in methods of prosecution (see Table 1).

The truly private prosecution was the blood feud. There was no monetary incentive, just personal revenge. An important advance was the invention of a monetary incentive system known as compositions. It consisted of a schedule of payments for damages which the victim or his kin might accept to placate their desire for revenge. These systems served a valuable social function. They allowed order to be restored by buying off the feud. Nevertheless they are private because they were (initially) entirely under the control of the parties to the dispute.

Table 1. Dimensions of Prosecution Systems -- With Sample Institutions

	"Private"	Public
Monetary Incentives	Composition (victims & kinsmen) Prosecution societies Rewards/bounties "Private prosecutors" (hired attorneys)	Public Prosecutor Investigating magistrate Police --- Justice of Peace Constables Honoratiores
No Monetary Incentives	Blood feud (victims & kinsmen) Vigilantes Complainants	Hue and cry Grand Jury Elected presenter Early constables

Public prosecution begins when the victim could call upon notjust his own kin but the larger community through the hue and cry to protect his private interests. Other early public institutions of prosecution include the presentment grand jury and the early constable. It should be clear that what makes these institutions public is that they are acting on behalf of the larger community. It has nothing to do with whether monetary incentives are involved; or whether the incentives are paid as fees, salaries or wages.[23]

Once true criminal law has been established monetary incentives are used in its administration in two ways representing different levels of development of societies and their justice systems. Rewards and fees are used to supplement the limitations of existing systems of prosecution and to minimize costs. This form of payment is characteristic of societies that still rely on private individuals to bear all or a significant part of the cost of prosecution. The use of salaries and wages occurs later when the machinery of crime control is bureaucratized and its costs fully socialized.

Prosecution systems that rely on voluntary institutions presuppose small, tightly integrated, settled communities. When those conditions change the effectiveness of the institutions declines. Sometimes attempts have been made to offset such declines by placing greater emphasis on rewards and fees in order to motivate private individuals as well as public officials to enforce the law. In the West the use of rewards and fees has an ancient history. Their enhanced use as a means of propping up a failing system of private prosecution is particularly clear in English history.

During the eighteenth and nineteenth centuries as feudalism declined and international commerce and travel made human relationships more transitory, fees and rewards were given a new emphasis. Both the government and private individuals, insurance companies, and "prosecution societies" established new financial and other incentives for the prosecution of crime.[24] The cost of prosecution was prohibitive. Legislation enacted in 1752 made some public provision for this purpose, but not enough to cover the full cost of prosecution. Indeed it was not until well into the nineteenth century that, as a practical matter, criminal prosecution was readily available to anyone but the wealthy.[25]

In the interim the government created a series of additional incentives explicitly designed to induce private citizens as well as public officials to enforce the law. The incentives included statutory and ad hoc rewards, categorical pardons for accomplices, and the "Tyburn Ticket," which entitled anyone bringing a certain class of felons to justice to a lifelong exemption from the burden of serving "all offices within the parish or ward where the felony

was committed".[26] However, these incentives were not enough to make the failing system work or to satisfy a new demand for effective prosecution. Instead that demand resulted in private initiatives to further supplement the system.

The changing economy had produced a rapid expansion of both agricultural and industrial capitalists who had a specific interest in the protection of private property. These "propertied" classes included a mixture of landed gentry, farmers, petty bourgeoisie, and the emergent industrial bourgeoisie. They were eager for vigorous enforcement of the existing criminal law and devised an economical means for doing so. They formed prosecution societies. Members paid an annual subscription fee which was used to meet the expenses connected with the investigation, apprehension (by either reward or payment of specialists), arrest and prosecution of offenders who committed crimes against their property.

Fees and rewards also played a role in the history of the American and continental systems of criminal prosecution as well. In addition, on the continent the partie civile or private suit for damages attached to the criminal prosecution served an analogous purpose. Virtually everywhere covered by this survey, public officials have been allowed at sometime to charge fees for their prosecution services. In France the seignorial courts of the feudal system lasted until the French Revolution when 50,000 or so of them were abolished.[27] These courts were owned by private individuals who earned a living from the fees or sold their courts for profit. Yet, they administered "public" justice for they held sole jurisdiction for their geographic areas.

Prosecution systems based on fees and rewards are subject to a variety of weaknesses including abuse and private profiteering. Their ultimate weakness is that they are unable to forge an effective link between the individual and the collective interest.[28] Crime control efforts remain ad hoc and provisional (rather than part of a centrally conceived and directed plan). The net of incentives which is woven grows ever more tangled and porous. It tends to catch the little criminals but let the big ones break through. Indeed, it often encourages the very behavior it was intended to eliminate. At the same time, instead of controlling costs it increases them serving only to funnel them into new forms.

The irrationality and inefficiency of the "trading in justice" may be illustrated by a few brief examples. In England, the justice of the peace or magistrate "was the product of the system which aimed at making the administration of justice self-supporting by exacting a fee for every act that was performed. These fees were individually small in amount, and they could only be made to yield an income to magistrate and clerk by a perpetual flow of business which it thus became the interest of both of them to promote".[29] Consequently, "the transition from encouraging business to a corrupt or oppressive use of magisterial authority in order

to extorting fees or levying blackmail was, to a Trading Justice, seldom perceptible."[30] Not surprisingly, we find that "to keep up the flow of business some magistrates employed barkers and runners to tout for customers and when business was slack the magistrates even allowed credit, issuing warrants and summonses on easy terms."[31]

The same abuses had arisen in the French courts. Pussort, councilor to Louis XIV and leading architect of the French Ordinance of 1670 documented them in various memoranda.

> "I am forced to tell your majesty of a mischievous custom which is practiced in some presidials (courts).... In order to increase practice and chicanery, they establish clerks in the cities and market-towns of their jurisdiction, who, at a price, distribute commissions to make inquiry into crimes and offenses, addressed to the chief royal officer of court....[I]t very often happens that the guilty informs against an innocent party, and carries the information to decree; the innocent party is arrested, which occasions many wrongs."[32]
>
> "It would be expedient for the well-being of justice to abolish the small marshalcies (courts). For [they] work incredible ruin among a poor populace....[T]hey commission jailbirds, and arrest poor peasants, whom they think may have some property, under the pretence that they have stolen or have carried firearms, and imprison them in private jails until they have extorted money from them."[33]

While innocents were exploited, the guilty went unprosecuted. Unless a private prosecutor brought the action, the criminal went free.[34] The king and the lords refused to pay the fees for their own prosecutors to service the cases. In 1664 the attorney-general of the Parlement of Bordeaux complained to one of the King's councilors: "It is impossible to compel the tax-collectors to defray the expenses necessary for the punishment of criminals.... They say that they have no funds, so that many heinous crimes remain unpunished."[35]

Ancient Greece also experienced the abuse of fees and rewards for prosecution but only in those cities where prosecution was left to the private individual. For instance in Athens where voluntary private prosecution of public crimes was regarded as a civic duty supposedly inspired by disinterested motives, prosecutors were not infrequently little more than professional informers trying to make a profit out of the share of the fines or confiscated property which in certain cases was due to successful prosecutors. The same general conditions had produced similar evil effects in Thebes. In Sparta, on the other hand, where prosecutions were in the hands of the annually elected board of ephors, sycophancy never made an appearance.[36]

Systems driven by fees usually have unanticipated, even unwanted consequences. Fee structures typically are differentially weighted towards particular outcomes. They drive cases in those directions whether or not they are in the best interests of the overall system. The development of public prosecution in Scotland as well as the change from fees to salaries for public prosecutors in American jurisdictions such as Pennsylanvia illustrate the point.

The transformation of Western prosecution systems from fee-based piece-work systems to salaried bureaucracies was part of a much larger movement toward rational management in public administration, finance, and economic policy--indeed in social life as a whole. On the most fundamental level, such rationalization was the product of competition in both the private sector, between firms for markets; and at the level of state administration, between states for political power.[37] The process was a progressive and self-perpetuating one. Increased rationalization in one sector reacted back on and reinforced pressures toward rationalization in others thereby sustaining a cumulative advance in the direction of increased systematization of human activity.[38]

This same process of rationalization also shaped the transformation of the accusatorial procedure of feudal Europe to the inquisitorial procedure that emerged in the late Middle ages in France and the emerging cities of northern Italy, Germany and the Netherlands. However, in this earlier instance, fees and rewards were not entirely eliminated. Police salaries were supplemented by rewards for exceptional actions; public prosecutors were charged fees for their services; and secret accusers were encouraged by the provision of substantial rewards for successful prosecution.[39]

It is not until the nineteenth century when public prosecution systems began to be operated on a salaried, bureaucratic basis that their agents are fully "public." Until then fee-seeking public officials acted more like greedy private entrepreneurs than impartial ministers of justice. Only modern bureaucracy could provide the structural conditions under which prosecution officials could make their decisions "without anger or passion", where overall system goals could be considered apart from the personal financial self-interests of the officials.

The modern bureaucratic form of prosecution brought with it certain important benefits. It made the liberal ideal of the impartiality of justice ushered in by the American and French revolutions an obtainable goal. It established the means by which public policy regarding crime control could be more precisely attuned to gradations in seriousness of the crime problem and more responsive to changing public priorities. It made it technically feasible to address the perennial concern for efficiency and effectiveness with the cold calculation of selective prosecution

policies.

On the other hand, bureaucratic prosecution also created new dangers and problems. As De Tocqueville noted in his observations on the increasingly bureaucratized form of government, the modern bureaucratic official wields more power than that of the monarch in traditional society. Modern bureaucracies are powerful machines whose resources may be directed for good or for evil. Their strengths from one point of view are weaknesses from another. The same characteristics that permit them to achieve the desireable goals of impartiality, efficiency and accountability also cause them to be rigid and unresponsive to the needs for equity and the individualization of justice.

By routinizing justice, they heighten the dilemma of choosing between procedural fairness and equal application of the law, on the one hand, and substantive or individualized justice, on the other. By socializing the administration of justice to the point where it is feasible and reasonable to set national, state, or local prosecution policies, they highlight the political dimension of criminal justice. They make it clear that the volume and mix of cases and criminals processed by the courts can be regulated by public policy and need not be left to the vagaries of individual case outcomes. For countries in the "civil law tradition"[40] such as Italy where stringent efforts are made to maintain a separation of politics from prosecution, this presents special dangers.

Finally, bureaucracies are subject to their own form of corruption known as "goal displacement". State bureaucracies such as prosecution or police agencies where the organization does not control its own financing are particularly susceptible to this tendency. That is, the organization takes on a life of its own and becomes concerned about its own survival and well-being even at the expense of achieving its official goals.[41]

These problems raised by bureaucratized prosecution are the problems which preoccupy modern reformers and administrators. Plea bargaining, selective prosecution, career criminal targeting, early case screening, police-prosecutor coordination, the use of computerization and artificial intelligence in prosecution, the American interest in Continental forms of controlling prosecutorial discretion, the Italian interest in American ways of disposing of criminal cases, all these topics have emerged out of the bureaucratic context of modern prosecution. They reflect the concern for achieving rationality, both formal and substantive, in the prosecution of crime.

Endnotes

1. Devlin, 1958: 2.

2. Critchley, 1967; Monkkonen, 1981; Radzinowicz, 1948-68; Reith, 1975; Robinson and Scaglion, 1987.

3. Rusche and Kirchheimer, 1968.

4. Bayley, 1975: 328.

5. Bitner, 1974.

6. Calhoun, 1927: 5.

7. Lowie, 1927: 103.

8. Weber, 1954.

9. Wrong, 1970: 26.

10. Esmein, 1913: 3.

11. Emphasis in the original.

12. Quoted in Guarnieri, 1984: 126.

13. Williams, 1958: 29.

14. Goldstein and Marcus, 1977: 212.

15. In this context the phrase, "civil law", does not refer to tort law but to the legal systems of countries which have a certain legal "tradition". It is distinguished from legal systems with a "common law" tradition (see Merryman, 1985).

16. The systems continue to change--in the direction predicted by Esmein. For instance, Italy which only recently was referred to as the prototypical inquisitorial system (Goldstein and Marcus, 1977: 247) has adopted a new code of criminal procedure making its system "accusatorial".

17. Damaska, 1975.

18. Professor Sigler (1979) has presented a structural-functional analysis of prosecution systems as an alternative to Damaska's approach.

19. Codice di Procedura Penale, 1988.

20. It is this point in a somewhat different form that lies at the bottom of the criticism by Professors Langbein and Weinreb (1978) of the provocative analysis of the inquisitorial systems of France, West Germany and Italy by Professor Goldstein and Research Fellow Marcus (Goldstein and Marcus, 1977). The latter two had reported that substantial proportions of criminal caseloads in those countries were disposed of by charge reduction, dismissal or brief trials. They concluded that the inquisitorial system actually operated in ways similar to the American system using procedures which looked like functional equivalents of plea bargaining and other discretionary methods.

Langbein and Weinreb made several specific criticisms. But, their fundamental point was that because of the hierarchical ordering of the agencies of justice in inquisitorial systems and the lack of a similar organization in the American system, the two systems substantially different.

21. Williams, 1955.

22. In the United States since the 1970's the Victims's Rights movement has attempted to restore victim interest in and partial control over the disposition of cases.

23. We emphasize this point to distinguish our use of these terms from that of Spitzer and Scull (1977:267) in their thoughtful history of social control in England. For the purposes of their particular analysis a social control system is defined as "private" if it is" predicated on a market or contractual relationship". It is "public" if it is "supported by taxation, organized on a bureaucratic basis and operated directly by full-time employees of the state". They distinguish these two methods from an unnamed third type characterized by "arrangements offered voluntarily or through some sense of community obligation".

The difficulty with their conceptualization is again the problem of trying to say too much with too little. Their special use of these terms prevents them from being used to distinguish public from private institutions in the normal sense of the terms. For instance, the presentment grand juries of the Carolvingian and American legal systems were voluntary, unpaid public bodies with the responsibility for identifying offenders. These institutions were established to supplement and overcome the weaknesses of the purely private system of accusation by the injured party. Clearly, these should be distinguished as "public" as opposed to "private" institutions; but, they would not be so using the Spitzer and Scull definitions.

Similarly, it is confusing to refer to public officials such as magistrates who are paid by fees as representing a "private" system of social control, as they do.

We agree with Spitzer and Scull that the transition to a fully socialized system of social organized on a bureaucratic basis and operated by full-time employees of the state represents a critical change in the nature of control mechanisms; but, we find it clearer (albeit less tidy) to keep the normal meanings of the public-private distinction and to address the matter of monetary incentives and their form separately.

24. Little and Sheffield, 1983.

25. Little and Sheffield, 1983.

26. Patrick Colquhoun, quoted in Spitzer and Scull, 1977: 270.

27. Dawson, 1960: 79.

28. This analysis owes much to that of Spitzer and Scull (1977) although our definitions of public and private are different.

29. Webb and Webb, 1906: 326.

30. Webb and Webb, 1906: 326.

31. Pringle, 1958: 57.

32. Esmein, 1913: 193.

33. Esmein, 1913: 194.

34. This would be done by someone seeking to avail himself of the partie civil procedure. In such cases, the private prosecutor bore the expense of the joint criminal and civil prosecution even though the criminal side of the action was supposedly for the benefit of the community (Esmein, 1913: 123, 279).

35. Esmein, 1913: 280.

36. Jones, 1956: 128.

37. Weber, 1961.

38. Spitzer and Scull, 1977.

39. See infra for documentation.

40. Merryman, 1985.

41. Chambliss and Seidman, 1971: 266.