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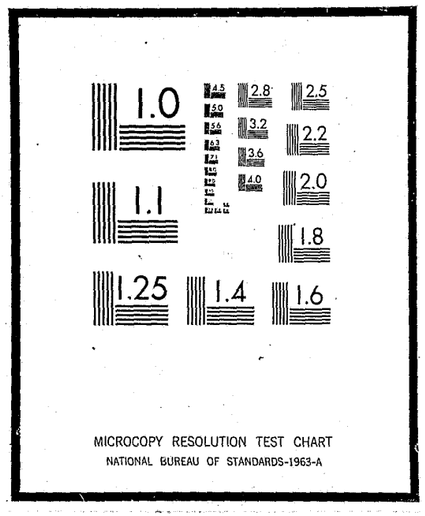

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DRAFT FOR EDITORIAL REVIEW

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THE POLITICS OF PROSECUTION: A Bibliographic Working Paper

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DRAFT FOR EDITORIAL REVIEW

I. INTRODUCTION

Matthew Holden, Jr.*

The growing interest in problems of order and control--reflected alike in public policy and in scholarly analysis--is a predictable consequence of urbanization. For urbanization inherently means not only a densification of human bodies, fur a densification of social systems--with much resultant social-cultural conflict.[1] For the use of such colleagues as may be interested, this bibliography has been developed on one aspect (prosecution) of one important part of the public order process (administrative decision-making). But it was originally evoked by my problems as a teacher of politics. If, as teacher, one were trying to help students clarify problems of public order, it seemed that one would have to go well beyond the usual discussion of police behavior. For police behavior is but one link in a complex administrative web. Another important link in this web is the process of prosecution. Indeed, it is quite common for writers on state and local politics to describe the prosecutor as "the most powerful official in local government," an attribution usually justified by reference to the wide range of discretionary powers formally vested in the office of prosecutor. It is also quite common for writers to say that prosecutors do use those discretionary powers in a way which favors one faction rather than another, which enhances the prosecutor's personal chances to move to a higher office, etc.

But when one looked for substantial material by which students might learn to discover whether such statements are correct, one found less than enough. One could find tangential hints in such works as Harold F. Gosnell's Machine Politics, Alex Gottfreid's Boss Cermak, or Wallace S. Sayre and Herbert Kaufman's Governing New York City. But no full-scale book on the subject seemed to have been published

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since Raymond Moley's Politics and Criminal Prosecution (1927) leaving both teacher and students to depend on the folklore of practitioners, the inside-dope of courthouse reporters, and such apparently insightful (but also imaginative) novels as James Gould Cozzens, The Just and the Unjust. I did not think there was legitimately much that I could teach my students out of that background, but I did not think the subject could be ignored either. Hence, I began (about 1964) to inquire of colleagues who specialize in public law--as I do not--what research had been done or was in process. One began to learn of a few new projects*--new projects--some of which have been completed and are included in the bibliography. But, at that point there still seemed very little professional interest in the subject, at least among social scientists. For example, at the meeting when the political science section of the Law and Society Association was organized, the two dozen (or so) scholars -- including several engaged in the most avante-garde research -- reported informally on their research and research hopes. Not one voluntarily mentioned any aspect of prosecution!

Consequently, it seemed reasonable to guess that, if there were work going forward but not yet ready for book-length publication, it would find some expression in periodical sources. Several graduate students* were, at different times, assigned to examine the Index to Legal Periodicals (to be sure that the law journals were covered systematically), the Social Sciences and Humanities Index (to include most of the social science sources), and the Public Affairs Information Service (to try to pick up both academic and high-level, semi-popular sources). This search was limited to the period since the Second World War.[2] I do not suppose that the citations so gathered are exhaustive, and it is possible that important materials were

*This would have included the dissertation projects by George F. Cole (now of Allegheny College) and James Eisenstein (now of University of Michigan), both of which had been initiated under the sponsorship of David J. Danelski, some field studies by Yale Kamisar in Minnesota, and the prosecution volume being prepared for the American Bar Foundation Survey of Criminal Justice by Frank W. Miller, Washington University Law School.

were excluded because neither the student assistants nor I myself were legally-trained and, hence, might have missed some important categories.[3] However, we tried to be inclusive rather than exclusive on this first round.

Introduction Footnotes

1. Matthew Holden, Jr., "The Quality of Urban Order," in Henry J. Schmandt and Warner Bloomberg, Jr. (eds.) The Quality of Urban Life, Los Angeles: Sage Publications, Inc., Forthcoming.

2. For some useful guides to pre-World War II materials, Cf., the series by Newman I. Baker and James DeLong in Journal of Criminal Law, 23-25; and, Lester B. Orfield, Criminal Procedure from Arrest to Appeal, New York: New York University Press, 1947.

3. Those who need to do more bibliographic work may be helped to know exactly what sources we covered, for what times, and by what categories. The Index to Legal Periodicals and the Social Sciences and Humanities Index orits predecessor were examined for the period 1945 circa to September 1968. PAIS was examined from April 1943-March 1961 and April 1962-September 1966. In these sources, we looked for citations as follows:

Categories	Index Legal	Social Sciences Humanities
Attorneys General-U. S. Attorneys General	x	x
Crime, Criminals, etc.	no	x
Criminal Law (in general)	x	no
Criminal law (preliminary complaint, etc.	x	no
Criminal procedure	x	no
District Attorneys and Prosecuting Attorneys	x	x
Evidence	no	x
Grand Juries	no	x
Indictment, information	x	x
Judicial procedure, etc.	no	x
Justice, Administration of, etc. and Politics, etc.	no	x
Law (Enforcement and in general)	no	x
Legal Procedure, Ethics, Rights, Profession, etc.	x	x
Pre-trial procedure, etc.	x	x
Prosecutors, Public Prosecutors, etc.	x	x
Trials, trial practice and procedure, etc.	x	x

The topic headings checked in PAIS were substantially the same. In addition, a few entries were based on scattered checks: (1) Cumulative Book Index (1957-62), (2) Journal of Criminal Law and Criminology (March-April 1958-59 to December 1963), (3) Journal of Public Law (1959-63), and (4) Dissertation Abstracts (1959-August 1964), but these did not seem to add much.

II. ANNOTATED BIBLIOGRAPHY

It is not quite useful simply to list citations, but it is not very easy to find a reasonable basis for classifying them. It will be obvious, that the articles tend to overlap or to converge but the citations below are classified by the topic to which the article or paper seems most immediately to relate.

Background of the Office:

1. "District Attorney -- A Historical Puzzle," Wisconsin Law Review 1952 (January 1952), 125-138.

   Discussion of historiographic problems and of European and English influences upon development of the prosecutor's office in the United States.

Recruitment and Social Backgrounds of Prosecutors:

2. H. H. Bull, "Career Prosecutor in Canada," Journal of Criminal Law, (March 1962), 53:89.

   Comparison of Canadian and U.S. stystems of prosecution. Advocacy of a system of career prosecutors.

3. Richardson Dilworth, "Problems in Reorganizing the District Attorney's Office in Philadelphia," Dickinson Law Review 57, (1952) 82-85.

   The then "reform" District Attorney of Philadelphia discusses the administrative problems of an urban district attorney's office, particularly in a transition from seventy years' control by the opposite political party. The heavy and complex work could only handled if (1) customary practice permitting Assistant District Attorneys to engage in private practice was abandoned -- which, since it meant reductions in income, led to lower age levels and consequently less experience in the staff, (2) exclusion of county detectives from "politics," this placing them in a relationship analoguous FBI and Attorney General of the United States, and (3) systematic revision of clerical-administrative procedures to expedite work-flow and reduce actual number of persons employed in the office. Discussion of new Rackets Division, with strong criticism of local officials who regard organized crime as a national problem which cannot be met locally.

4. John W. Green, "Attorneys-General of Tennessee (1865-1913)," Tennessee Law Review 19:385 (1946).

   Biographical sketches.

5. Herbert Jacob, "Politics and Criminal Prosecution in New Orleans," in Kenneth N. Vines and Herbert Jacob (eds.), Studies in Judicial Politics, (Tulane Studies in Political Science, Vol. 8) New Orleans: Tulane University, Department of Political Science, 1963, pp. 77-98.

   Statistical comparison of District Attorney's office under two incumbents of different social-economic status. In this community where crime is often a major electoral issue, "the political arena impinges on the criminal prosecution process less directly than expected. The district attorney's office is sensitive to community tensions, as its /harsher/ treatment of Negroes since 1954 suggests. Likewise, It makes some -- though not a great deal -- of difference whether one man or another holds the office." The author is explicit that what he has "not been able to show" are the paths by which political influence is channeled and the barriers which impeds such influence under specific conditions. That, as well as a more generalized assessment of the impact of politics on crominal prosecution must wait further research."

6. L. W. Kennedy, "Local Politics vs. Prosecuting Attorney," Journal of the American Judicature Society, Novem. 1940) 23: 180-182.

   Argument that the prosecutor's functions are of such importance that they demand the same kinds of judgments and skills as explicitly judicial offices, but that prosecutors cannot perform these functions well so long as they are "in politics." Specific reference to a Pennsylvania county with population of about 250,000. Hortatory rather than analytical.

7. R. H. Kah, "Careers in Prosecuting Offices," Journal of Legal Education, 14 (December 1961) 175.

   Advocacy of a system of "carrer" rposecutors -- which apparently means as this author defines the idea -- not so much a bureaucratic or specially-trained civil service as prosecutors with long continuity in office. Satisfactions and tensions of the prosecutor's role are discussed, with particular emphasis on low money rewards.

8. Ken Ori, "The Politicized Nature of the County Prosecutor's Office, Fact or Fancy?" - The Case in Indiana, " Notre Dame Lawyer, 40 (April 1965) 289.

   It was concluded from questionnaires administered, in Indiana, to the county attorneys that, as traditionally assumed, county prosecutors are young, inexperienced, and polotically ambitious and view their offices as stepping stones for higher political office. The prosecutorship has not been significant in the career pattern of Indiana governors or U. S. Senators. However, it has been a more viable factor for a career in the U. S. House of Representatives and law enforcement agencies.

9. "Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction," Yale Law Journal 65 (December 1955) 209.

   In the event of prosecutors' inaction, a private citizen should be allowed to prosecute if the court considers the criminal action justified. In effect, this proposes that the area of prosecutional discretion be transferred to the judiciary.

10. "Prosecutor Indiscretion: A Result of Political Influence," Indiana Law Journal 40 (Spring 1959) 477.

Prosecutor indiscretions such as adverse ethnic references, prolonged questioning without formal charges (cites Chambers v. Florida 309 US 227, 1940 as an extreme example of 5 days questioning, including one all-night session), and other behaviors of a similar nature constitue violations of proper trial court standards and appellate courts do not systematically correct such violations. The author attributes such actions as the result of "seeking a conviction, rather than the ascertainment of truth and justice, and / these actions/ stem from the political nature of the prosecutor's office." (p. 485). Political influence also produces bargaining by the prosecutor and uneconomical administration. The author proposes to remedy the purported difficulties by a system of appointment (on the manner of the U.S. attorneys) rather than election saying that "the governor and senate could be trusted to make more carefully considered and unbiased appointments than can county and urban politicians."

11. ". . . Yes, But Don't Stay Too Long." The Shingle 139 (1957).

Discussion of professional gains and losses involved in accepting appointments to U.S. Attorney's office.

12. D. R. Nedrud. "Career Prosecutor," (Part I-IV) Journal of Criminal Law, (1) 51 (S-0 1960), (2) 51 557, (3) 51 649, (4) 52 103. Four parts consisting of chapters in Nedrud's Master of Laws thesis /Northwestern, 1958-59/

Part I examines qualifications, selections, jurisdiction, and compensation, as well as other aspects of the prosecutors office in 48 states (continental U.S.)

Parts 2-4 present a normative evaluation and propose a Department of Criminal Justice to regulate and make more uniform the office of Prosecuting-attorney in the several states.

The Definition of the Prosecutor's Roles

12. James D. Barnett, "Prosecution or Persecution," Oregon Law Review 30: 322-329.

Restatement, by a political scientist, of the normative case for emphasizing the prosecutor's quasi-judicial role in preferent to his role as advocate on one side. Citation of case materials to indicate divergence from this norm in practice.

13. Ann Balanger, "Criminal Law: The Prosecutor's Duty to Disclose Exculpatory Evidence," Oklahoma Law Review 19 (November 1966) 524-530.

Through explanations of various court rulings on criminal clases, which are mainly based on Brady V. Maryland, the author shows that in a criminal prosecution, the state must disclose all material which may help the accused in his defense. It is also the prosecutor's duty to take the initiative to disclose the evidence in time for it to be beneficial.

14. "Civil Rights--Section 1983--Prosecuting Attorney Held Immune from Civil Liability for Violation of Civil Rights Act," New York University Law Revue, 42 (March 1967) 160.

The state prosecutor is immune from civil liability for violation of Civil Rights Act of 1871 if he can show that his act was (1) within his judicial authority and (2) inside his jurisdiction. Since it is so difficult to differentiate between acts in excess of the prosecutor's authority from those outside his jurisdiction, the second criterion has been rendered fairly useless as illustrated by the Bauers case, says the author. He further suggests that as long as the prosecutor acts within the scope of his authority despite his ran or intent (unless "malice, corruption, and cruelty and ruthless indifference to a citizen's rights" is shown).

15. Walton Coates, "Grand Jury, the Prosecutor's Puppet. Wasteful Nonsense of Criminal Jurisprudence," Pennsylvania Bar Association Quarterly, 33 (March 1912) 311.

Practicing attorney argues that, in practice, the prosecutor does dominate grand jury proceedings. This point is illustrated with data from Montgomery County (Philadelphia Metropolitan Area), Pennsylvania, indicating that in the five-year period February 1955-June 1960 4006 bills of indictment were before the grand jury, of which the grand jury returned 3811 (95%) as true bills. Since the prosecutor dominates the grand jury, suggests the author, the more efficient procedure would be to adopt a constitutional amendment eliminating the grand jury and permit the prosecutor to initiate actions by information.

16. "Disclosure of the Prosecutor's Evidence," New York University Law Review 42 (October 1967) 764-71.

The article is based on Levin v. Katzenbach (363 Fed. 287). It was held in this case that the prosecutor has a duty to ensure that the defendant gets a fair trial. Therefore he must present all such evidence in his possession, irrespective of the fact that such evidence could have been obtained by the defense.

17. J. Elliott Bunce and Eric Youngquist, "Discovery and Disclosure: Dual Aspects of the Prosecutor's Role in Criminal Procedures," George Washington Law Revue, 34 (October 1965) 92-109.

In these editorial notes, it is pointed out that the duty of the prosecutor to reveal evidence to the defendant upon his request has grown progressively stronger over the years through court rulings, as his his duty to disclose evidence even without a request. The article traces these trends through court history which seems to vindicate the idea that the prosecutor must ensure that justice is done both to the defendant and society placing him in a dual role. The authors conclude with a suggestion for a federal rule which would require the prosecutors to disclose possible exculpatory evidence and witness names to the court which would release it to the defense after it has shown that the material is needed in its defense.

18. A. R. Gough, "Referees in California Juvenile Courts," Hasting Law Journal 19, (November 1967) 3-28.

This is a study of the use of referees in California's Juvenile Courts. The article seeks to focus attention on the role of the referees in the judicial process. At present half of the California courts make use of referees in two-fifths of cases. In nine counties referees adjudicate and make dispositional orders in virtually all classes of cases. Since the referees play a judicial role, they should have some legal background.

19. S. G. Hobbs, :Prosecutor Bias, An Occupational Disease," Alabama Law Review 2, (Fall 1949) 40-60.

In this article, which has been extremely influential to judge from its citation by other writers in the past 15 years, Hobbs takes the characteristic view that the prosecutor's discretionary powers make him one of the most powerful officials in State and local government. He also takes the view that such discretion constitutes a threat to due process. In contrast to most writers sharing his views, Hobbs emphasizes the psychological basis of "prosecutor bias," i.e. the prosecutor's feeling of being engaged in a "no-holds-barred" war against crime. His specific remedies do not, however, follow from the logic of this analysis but rather follow the characteristic prescriptions of removing prosecutors from politics by making them appointive (with explicit reference to the U.S. Attorneys as his model), of centralizing control over prosecutions, etc.

20. C. Humphreys, "Duties and Responsibilities of Prosecuting Counsel," Criminal Law Review, 1955 (Dec. 1955) 739.

English discussion of duties of the prosecuting counsel both before and at the trial, as well as a description of the differences between prosecution and defense.

21. "Legal Methods for the Suppression of Organized Crime," (A Symposium), Journal of Criminal Law, 48 (Nov.-Dec.1957) 414-430, 48 Jan.-Feb.-1958) 526-41.

Three papers of this symposium are relevant to prosecutorial discretion.

(a) The first discusses legal remedies against corrupt law enforcement officers and the prosecutor's possible role in such remedies.

(b) "The Investigative Function of the District Attorney," discusses the statutory basis of prosecutor investigations, prescribes proper investigative methods, and comments on the overlapping jurisdictions of prosecutors and other administrative officers of the law (i.e. coroner, sheriff, etc.)

(c) "Circumventing: The Corrupt Prosecutor" discusses statutory and common-law methods for circumventing corrupt prosecutors. The author recommends that the attorney-general supersede the prosecutor under some such circumstances, but also recommends that statutes and judicial precedents be expanded to permit the trial judge to appoint special prosecutors, subject to appeal.

22. F. E. Moss, "Professional Prosecutor," Journal of Criminal Law, 51:461, N-D '60 points up the significance of the office and duties, leading to an argument that a "well-trained, competent, and imaginative professional prosecutor."

23. D. R. Nedrud, "The Role of the Prosecutor for Criminal Procedure," University of Missouri at Kansas Law Review 32 (Winter 1964) 142.

Survey of criminal procedure roles and statutes of fifty states. Based on this survey the author analysis the role played by the prosecutor in (a) arrest, complaint and preliminary hearing; (b) dismissal (preliminary hearing); (c) accusation, indictment, and information; (d) discovery procedure; (e) trial by jury; (f) punishment, and (g) new trials and appeals.

24. Whitney North Seymour, Jr., "Why Prosecutors Act Like Prosecutors," Record of the Association of the Bar of the City of New York, 11 (Jan. 1956) 302.

Seymour, then Assistant U.S. Attorney in New York City, significantly qualifies the prosecutorial role usually found in legal literature (cf. item 15, above). In this personal essay, Seymour divided the flow of the law case into four phases (a) before the indictment, (b) the period of the "waiting game before the trial," (c) trial preparation, and ((d) actual trial conduct. Discretionary problems for the prosecutor arise before the indictment when "we have the responsibility of deciding whether to accept prosecution or to decline." The "decision not to prosecute" is usually made on the ground that no crime has occurred or that the legal evidence is insufficient. In the Federal District Courts, guilty pleas predominate and this is connected to "the waiting game," there being two reasons for delay. One reason is the preparation of the trial, a matter on which a number of practical suggestions are offered. The other is that the Government is often unsure whether the defendant actually means to go on trial. At arraignment, not guilty pleas predominate and it is during the waiting period that defendants and their lawyers must decide to change pleas, etc.

Seymour is quite clear about his view of the prosecutor's function. "The Canons of Professional Ethics define the prosecutor's job as follows: 'The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done.' That is precisely the way we conceive our jobs. This definition comes into play, however, when a case is first brought in to the office and is being readied for Grand Jury presentation. This is where we exercise our judicial role in making decision as to whether to prosecute or to decline." (Italics supplied-MH)

25. Paul W. Williams, "The Prosecutor and Civil Rights," Association of the Bar of the City of New York Record. 13 (Mar. 1958) 129-38.

This article presents a discussion of : (1) civil rights as applied to criminal law, (2) growth and techniques of organized crime, and (3) the task of prosecution in enforcing law and order within limits of our traditional criminal procedure. The author cites three requirements he deems necessary for an effective prosecutor: (1) integrity and professional competence, (2) providing efficient investigatory techniques and methods, (3) insuring the accused a speedy trial. He portrays the role of a prosecutor as one of a trustee in maintaining constitutional requirements in the administration of criminal law. Also, it is emphasized that laws must keep pace with crime.

26. D. B. Wright, "Duties of a Prosecutor," Connecticut Bar Journal 33 (Sept. 1959), 293.

Duties of a prosecutor itemized as prosecution of crime; upholding the law and protecting the innocent; conferring with the defense; suggesting punishments; filing charges against defendants; and, preparing cases for trial.

27. Samuel Brezner, "How the Prosecuting Attorney's Office Processes Complaints," Detroit Lawyer 27 (Jan. 1959), 3.

Out of the many complaints received by the prosecutor, a substantial number do not go on to court. Assistant prosecutor in charge of criminal appeals discusses how the prosecutor exercises discretion about which cases should be sent on to trial.

28. A. H. Gates, Jr., "Can We Ignore Laws? - Discretion Not to Prosecute," Alabama Law Review 14 (Fall 1961) 1.

Gates argues that many laws are obsolescent and that it would be intellectually impossible for a prosecutor to know them all or to enforce them all. Prosecutors not only can and do ignore laws, but should do so. On this basis, he suggests eight decision rules to guide prosecutors' judgments about what to enforce or not enforce: (1) judgment as to sufficiency of the evidence for conviction -- the underlying premise being that failure to convict undermines respect for the law, (2) judgment as to who will benefit by the prosecution and whether it is worth it in those terms, (3) whether State-wide uniformity of enforcement is desirable (as in Sunday closing laws), (4) the degree of legal responsibility of the accused, (5) the previous entanglement of the accused with the law, (6) problems of publicity, (7) whether the case allows the potentiality of blackmail to private parties or to the prosecutor himself, and (8) whether prosecution would tend to martyr the accused.

29. J. P. Hoey, "Prosecuting Attorney and Organized Crime," Crime and Delinquency, 8 (Oct. 1962) 379.

Discussion of (a) executive and administrative capabilities appropriate to a prosecutor, (b) major areas of prosecutorial discretion, and (c) appropriate prosecutorial role in eliciting public support for suppression of organized crime.

With respect to discretion, the author emphasizes that this involves not only whether to prosecute and whether to accept a lesser plea, but also whether to pursue an investigation, which subject for investigation shall be chosen, and how intensively the investigation shall be pursued.

30. J. Kaplan, "Prosecutorial Discretion -- A Comment," Northwestern University Law Review, 60 (May-June 1965) 174.

Personal reflections by former Assistant U.S. Attorney indicating some considerations upon which action seems to be based, e.g. the belief in guilt, the probability of conviction, and the status of the attorney prosecuting. Author makes plea for further research and study leading to meaningful generalizations.

31. C. W. Luther, J. F. De Meo, "Prosecutor's Dilemma," California State Bar Journal, 34 (May-June 1959) 273.

The article shows the problem of the prosecutor in conferring with a party under arrest without the permission or presence of the party's counsel. Canon 9 of the Canons of Professional Ethics of American Bar Association which refers to this problem does not specify criminal cases. The authors suggest that in order to avoid this dilemma Canon 9 should be made applicable to criminal cases and each state should adopt a code of ethics and principles for the prosecution and defense of criminal cases.

32. "Statutory Discretion of the District Attorney in Wisconsin," Wisconsin Law Review 1953 (Jan. 1953) 170-176.

Comparison of mandatory responsibilities of prosecutor with respect to major offenses and discretionary responsibilities (which usually are not acted upon) for certain minor offenses. Suggests that in minor offenses of no great public concern, private prosecution might be allowed.

33. G. Williams, "Discretion in Prosecuting," Criminal Law Review 1956 (April 1956) 222.

The author discusses the principles upon which discretion is exercised, relevant legislation, and possible checks upon prosecutors. (The article is based upon English experience in prosecutions.)

34. Shelton C. Williams, "Discretion Exercised by Montana County Attorneys in Criminal Prosecutions," Montana Law Revue, 28 (Fall, 1966) 41-95.

These notes are essentially a result of an extensive survey concerning discretion in prosecution of the county attorneys in Montana. The survey revealed that the prosecutors exercise many extra-legal reasons for not prosecuting; therefore, at the prosecutor's discretion, many cases are not prosecuted and less serious charges and sentences are imposed. This is accomplished by bargaining with the defendant, limited effort in prosecution procedures in cases it wishes to be dismissed, and the failure to procure a special prosecutor. There are some limitations, however, on the prosecutor's discretion which include: (1) his duty to investigate, (2) his duty to prosecute, (3) control by the courts to dismiss and initiate action, (4) the supervision by the attorney general, and (5) the effects of public pressure. The sanctions on the county attorneys include: (1) removal from office, (2) criminal prosecution when he does not enforce particular laws, (3) disbarment, (4) private court suits. Some suggestions for statutory changes are made by the author, and an extensive appendix of research procedures and results of the survey on the discretional attitudes and practices of Montana county attorneys is also included. Its contants contain (among other things) the character of the cases and defendants prosecuted, opinions on the discretional prosecution practices, the effects of the various discretion-limiting variables mentioned above, etc.

Exercise of Discretion -- Bargaining

35.
35. "Duty of Prosecutor to Insure Defendant a Fair Trial," New York Law Review, 32 (March 1957) 607.

People v. Savvides (NY), 136 NE2d 853 held that by failing to make clear to court and jury that the witness expected reduced punishment in return for cooperation, the district attorney breached his duty to ensure a fair trial. This article discusses the Savvides rule and suggest that were it too rigorously applied, the prosecutor would be obliged to impeach his own witness. The rule should function, the author suggests, more as a reminder to the district attorney of his ehtical obligations than as an excessively severe curb.

36. Richard Mills, "The Prosecutor: Charging and 'Bargaining'" University of Illinois Law Forum, 1966 (Fall 1966) 511-522.

This is a record of a rather impressionistic talk at a symposium on Illinois criminal proce ure. The author states that the attorney must satisfy himself that certain parties are guilty, determine charges, deal with juvenile offenders as he sees fit, use the grand jury in his decision-making, participate in both trial and pre-trial conferences in order to expedite the criminal proceedings, and recommend sentencing. All of these often require "bargaining" with the defendent which should be carried out with common sense and high professional standards while constantly trying to best serve the public interest.

37. D. J. Newman, "Pleading Guilty for Considerations: A Study of Bargain Justice," Journal of Criminal Law, Criminology and Police Science, 46 (Mar.-Apr. 1956) 780.

The article is based on interviews with men convicted of conventional felonies in one court district. The majority of the convictions were not a result of the formal combative theory of criminal law involving a legal battle between defense and the prosecution, but were mostly compromise convictions, the result of bargaining between defense and prosecution.

38. "Official Inducements to Plead Guilty: Suggested Morals for a Market Place," University of Chicago Law Review 32 (Autumn 1954) 167.

Two standards are offered to guide discussion of prosecutor-induced pleas: (1) is there a knowing plea, or has the prosecutor deceived the defendant: (2) is there a voluntary plea, or has the prosecutor coerced or threatened the defendant? The suggestion is that a balance be struck between the need for effective and efficient administration on one hand, and the need for protection of constitutional rights of the defendant on the other. The author argues that vague arbitrary rules are not the answer to achieve such a balance, but that there is a need for more analysis.

39. "Prisoner Held Entitled to Coram Nobis Hearing Upon Allegation of District Attorney's Excessive Bargaining Pressure for Plea of Guilty," Columbia Law Review, 59 (May 1959) 806.

Coram nobis is a writ since the 16th century "used by English courts as a means of vacating criminal and civil jusgments in cases where it appears that the court was unaware of facts that would have changed its previous judgment." The writ has been increasingly widely used in the United States since Mooney v. Halohan 294 US 103 (1935) in which the Supreme Court held States constitutionally-required to furnish post-conviction remedies for persons convicted without due process.

The present note is based upon application of the writ of coram nobis in People v. Picciotto (NY) 151 NE2d 191 in which the following salient facts were present. Defendant had been convicted in 1956 upon 1955 indictments for robbery and receivng stolen property, to which he had entered a plea of guilty. His claim for coram nobis was based upon the contention that, prior to arraignment, an assistant district attorney had threatened that did he not plead guilty, he would also be prosecuted for burglarly, robbery, and larceny upon old 1950 indictments which had not been brought to trial. The assistant district attorney denied the claim but the court held the defendant entitled to relief by coram nobis ince the district attorney's rebuttal was not substantiated clearly.

Note raises the issue whether coram nobis is likely to applied so as to esclude all pressure before trial (including emphasizing to defendant the possibility of a maximum sentence) and concludes -- approvingly -- that this is likely, citing the Federal precedent against all "bargaining and barter" as against voluntary plea of guildty. (Cf. Shelton v. US. 242 F2d 101 / 5th Cir., 1957/, rev'd on rehearing en banc. 246 F2d 571 /1957/ rev'd on confession of error. 356 US 26 /1958/

40. Dominick R. Veltri, "Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas," University of Pennsylvania Law Review, 112 (Apr. 1964) 865.

Veltri demonstrates more clearly than any other writer whose work has been seen that bargaining between prosecutors and defendants is very widespread. He finds that three main areas of prosecutor discretion lend themselves to bargaining: (a) the prosecutor's power to make sentence recommendations, (b) the prosecutor's right to accept a lesser plea, and (c) the prosecutor's ability to dismiss charges. The author review the major judicial schools of thought on the legitimacy of such bargaining and the existing texts which the courts apply. The article also contains a normative appraisal of the interests to be served and offers a detailed set of tests for ascertaining when a plea is voluntary and when it is not.

This article is based upon a questionnaire to 205 chief prosecuting officers in 43 states. Ninety-nine of these questionnairs were distributed to prosecutors in California, Illinois, New Jersey, New York, Ohio and Pennsylvania. Eighty-three replies were received, and the analysis of the questions is reproduced in the appendix.

41. H. Cohen, "The Nolle Prosequi and the Lesser Plea," Cornell Law Quarterly, 33 (Mar. 1948) 407-413.

Cohen discusses New York statutes relative to nolle prosequi and the lesser plea. His suggestion is that whether the relevant discretionary power be vested in the trial judge, the district attorney, or whether it is to be exercised by agreement between the two, (1) the stigma of political pressure should be eliminated, and (2) better facilities for obtaining information should be developed.

42. "Nolle Prosequi," Criminal Law Review, 1958 (Sept. 1958) 573.

This article is based on on English example, and includes a discussion of the history of nolle prosequi, current practices, and control of the Attorney-General's power.

43. "Nolle Prosequi," Law Times, 214 (Aug. 1952) 108-111.

This article cites various precedents in English experience which seek to define and limit the power of nolle prosequi in England. The conclusion is that although the Attorney General files a nolle prosequi, and there can be no further proceedings on the indictment or information dropped, he may nevertheless begin anew and present a subsequent indictment or file a subsequent information for the same offense.

Exercise of Discretion -- Warrants

44. Frank W. Miller and Lawrence P. Tiffany, "Prosecutor Dominance of the Warrant Decision: A Study of Current Practices," Washington University Law Quarterly, (Feb. 1964) 1.

This article is a by-product of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. The ABF study, underwritten by a Ford Foundation grant, was concerned primarily with isolating and identifying the critical problems in current criminal justice administration. It is based upon detailed observation of the actual practices of police, prosecutors, courts and probation and parole agencies in Kansas, Michigan and Wisconsin.

45. M. C. Pollak, "Issuance of Warrants of Arrest Under Criminal Information," Federal Bar Journal, 6 (April 1945) 291-304.

This article concerns a technical point of law. It points out that a warrant may be issued on the oath of a government attorney, but that probable cause may also be required. The discretionary power lies entirely within the realm of the court. The author maintains that such flexibility is necessary.

Prosecutor's Conduct of the Trial Proceeding

46. "Adverse Comments by a Florida Prosecutor upon Defendant's Failure to Testify," University of Miami Law Review, 15 (Spring 1961) 293.

Review of cases in which prosecutor made adverse comments about defendant's failure to testify, with argumentation for and against such comment. The writer advocates legislation to authorize such comment.

47. J. E. Amerman, "Fair Trial and Free Press," Notre Dame Lawyer 42:06 (1967) 976.83

This is a criticism of the Wisconsin Supreme Court's decision in State v. Woodington (31. Wis. 2d 151). The attorney-general initiated pre-trial publicity as to the offense of the accused. Following the conviction, the defendant made an appeal on the ground of pre-trial publicity which had the tendency of preventing fair trial. The appeal was dismissed. The author suggests that such pre-trial publicity should be avoided as it hinders fair trial.

48. "An Exception to Collateral Estappel-In Criminal Cases because of Prosecutor's Incompetence," University of Pennsylvania Law Review 8 (June 1967) 1346-57.

In the case of Buatte v. U.S. (350 F. 2d 389), the accused was tried twice for the murder of two children with an insanity defense offered each time. He was acquitted in the first trial but due to some additional evidence he was convicted the second time. The author concludes that although some applications of collateral estoppel may perpetuate shocking injustices, the balance of public policy weighs against the allowance of any discretionary exception for prosecutor's incompetence.

49. F. A. Cone, "Some Problems of Ethics: Due Process in Criminal Prosecution," Idaho Law Review 1 (1964) 9.

The focus of this article is on "fair trial." The ideal criminal procedure is, impartial weighing of evidence by the jurors, who come to the trial without any prejudice. However, this impartiality may be affected by the extensive press reports initiated by the prosecution. He concludes by suggesting that the Bar should take necessary steps to prevent such misconduct on the part of attorneys.

50. R. Darde, "The Code of Ethics and Principles for the Prosecution and Defense of Criminal Cases," Alabama Lawyer 6 (Jan. 1945) 39-54.

The article emphasizes the need for a formal code of ethics for the prosecution and defense in criminal cases. The author presents the code as adopted by the Bar Association of Alabama on May 9, 1941.

51. William O. Douglas, "A Crusade for the Bar: Due Process in a Time of World Conflict," American Bar Association Journal, 39 (Oct. 1953) 871-5.

Argument that the attempt of public prosecutors to unleash public fury against defendants is an area of "dry rot" in constitutional guarantee of due process.

52. Tom M. Hillin, "Prosecuting Attorney who Violates an Accused's Constitutional Rights is Immune Suit for Civil Damages under 42 U.S.C. 1983 if He Is Acting within the Scope of His Office," Houston Law Revue,, (Winter, 1967) 551-557.

The author traces the common law history through the Bauers v. Heisel decision on 42 U.S.C. 1983. He then contends that the reasoning of the court was rather shaky and could not rectify the weaknesses of Section 1983. He therefore suggests that a new law could be formulated which would: "(1) provide a remedy to an individual who had been injured by the malicious act of a public official, (2) serve as a check on the official, and (3) not inhibit the conscientious public official who innocently errs."

53. "Improper and Prejudicial Conduct of the Prosecutor," New York Law Forum, 3 (Jan. 1957) 102.

In People v. Lovello (NY), 136 NE2d 483, there was overwhelming proof that the defendant was guilty of buying and receiving stolen property. Nonetheless, improper and prejudicial conduct by the district attorney, coupled with unnecessary delay in arraignment was held to be reversible error.

54. "Imputations on the Prosecutor's Character," (Regina v. Cunningham /1959/ 2 WLP '63), Law Quarterly Review, 75 (April 1959) 176.

This citation refers chiefly to private prosecution in England, but it is interesting in the context of the present working paper in that it reverses the usual discussion of adverse comment in American legal circles. Here the contention is that a defendant may, or should be, able to comment upon the character of the plaintiff or private prosecutor as a part of his defense.

55. "Inflammatory Pre-Trial Releases by the Prosecutor and the Due Process Clauses." NULR 47 (1952) 729.

Discusses Stroble v. California 34 US 131 (1952) in two respects: (1) what evidence shows that newspapers articles themselves deprive an accused of a fair trial and (2) of what effect is the added fact that a prosecutor participates in "trial by press?"

56. Douglas J. Kellerman, "Civil Rights--Immunity--Prosecutor's Immunity from Civil Liability under # 1983 of the Civil Rights Act of 1871: A Revaluation," Wayne Law Revue, 13 (Winter, 1967) 385-392.

After the author traces the history of court cases applying to the Civil Rights Act of 1871, he suggest that a new law be passed which grants immunity from personal law suits only when "liability will have no deterrent effect."

57. Frederick J. Ludwig, "The Role of the Prosecutor in a Fair Trial," University of Minnesota Law Review, 41 (April 1957) 602.

(Note: In the Mary Phagan-Leo Frank case (Georgia, 1913(?)), a Jewish plant manager was convicted of the murder of a 13-year old girl employee. The trial and related proceedings took place in an atmosphere extremely hostile to the defendant, who was lynched within sight of the burial place of the girl after the governor commuted the death sentence to life imprisonment.)

Professor Ludwig used the Phagan-Frank case as the basis for a discussion of the prosecutor's discretionary powers to initiate action, to compromise prosecutions, or to terminate prosecutions and as the basis for a discussion of prosecutor's practical ability to induce "trial by newspaper" and of improper comment. Remedies for prosecutor misconduct during trial also are subject to discussion.

58. "The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case," Columbia Law Review, 54 (1954) 946.

Discussion of factors leading to forensic misconduct, major types of forensic misconduct, factors involved in judicial revereal due to misconduct, and remedies believed appropriate for prevention of misconduct.

59. "Prosecutor Forensic Miscondict -- Harmless Error?", Utah Law Review, 16 (Spring 1958) 108.

Examination of case materials to show that adverse comment by prosecutors may be much more than "harmless error". (Note: On the "harmless error" doctrine, courts are inclined not to reverse unless the error can be shown to have deprived the accused of a fair trial. Of, the discussion of this point in the case material cited in item number 41.) Accordingly, this author urges a more assertive policy in which trial judges would call attention to, or even strike, prejudicial remarks by prosecutors. Initially, such a policy would lead to an increase in reversals, but such reversals would tend to level off once the new policy became clear.

60. "Trial Procedure - Improper Remarks of Prosecutor as Grounds for Reversal," (Peiole v. Dukes (ILL.) 146 NE 2d 14) West Virginia Law Review 60, (June 1958) 375.

A review of cases pertaining to the remarks of a prosecutor in a trial, which tend to prejudice the jury, is presented.

61. "Trial Before Trial?", Economist, 226 (March. 1968) 50.

The article deals with the rules bid down by ABA regarding what can be made public from the time a person is arrested until he is tried or released. Prosecutors, defense lawyers, police, judges and other court officials are precluded from giving any information regarding a case except, the name of the accused, the charge framed against him and the circumstance of the case.

62. B. Woldman, "Prosecutor's Closing Argument - Improper Comment, Prejudicial Infringement." DePaul Law Review 16, (Summer 1967) 504-10.

The article is based on the case of State v. Woodard (6 Ohio, St2d, 14) in which the prosecution made some abusive remarks in his conclusing argument. On review of the alleged error the Ohio Supreme Court held that even though the portions of the prosecutior's summation were improper, they were not prejudicial in view of all the accompaning facts of the case. This case is demonstrative of the greater latitude allowed to the prosecutor in the closing argument. Where the evidence is strong and crime serious, the court will not reverse the decision on the basis of improper language used by the prosecutor.

Judicial Control Over Prosecutors

63. "District Court Discipline of State Prosecutor for Failure to Enforce State Laws," Yale Law Journal 57 (Nov. 1947) 125-132.

In Wilber v. Howard, 70 F. Supp. 930 (E.D., Ky., 1947) the United States District Court excluded the elected Commonwealth Attorney from its rolls, as a disciplinary measure, for "persistent and blatant failure to enforce anti-gambling laws," The law review note here cited contains a detailed discussion of the precedents for such an exercise of the court prerogative.

Note: For other attention to judicial control see items 58 and 59 preceeding.

64. A. S. Goldstein, "State and the Accused: Balance of Advantages in Criminal Procedure," Yale Law Journal, 69 (June 1960) 1149.

In explicit rebuttal of the views of Learned Hand, Goldstein argues that the criminal prosecution is not handicapped by archaic rules but, on the contrary, that the balance of advantage has been shifted against defendants by judicial relaxation of the standards (a) for defining "presumption of innocence" in instructions to the jury, and (b) for regulating procedures to be followed by prosecutors, police, and others in pre-trial decisions.

65. Robert S. Merriot, "Appeals by the Prosecution and Protection of the Accused in State Criminal Proceedings, "University of Cincinnati Law Revue, 35 (Summer, 1966) 501-522.

In this editorial, Merriott urges legislative change to aid both the prosecutor and the defendant. Countering all the legal protections of the defendants, the county attorneys have been able to bring a defendant to trial more than once for the same crime by charging him with offenses to each victim, through overlapping charges, by holding a trial subsequently if a vital witness refuses to testify, and by having the judge call a mistrial. New laws which would allow prosecution appeals, and eliminate multiple charges and prosecution of only pert of the charges would help the defendants by limiting much of the prolonged harrassment. The prosecutors would benefit by being able to present all evidence without leaving some in reserve and cutting down time and expense spent in each case.

Administrative Control Over Prosecutors and Allocations of Authority Amongst Prosecutors

66. "Attorney General's Power to Supersede and Elected District Attorney," (Note), Temple Law Quarterly, 33 (1959) 78-88.

In re Grand Jury Investigation of Violations of Law in Use of City Labor and Materials of City of Pittsburgh, 365 Penna. 330 (1950) and cognate Pennsylvania cases involved politically-controversial efforts by the Attorney General of the Commonwealth to supersede local District Attorneys. The Pennsylvania Supreme Court has, apparently in contrast to the supreme courts of most other states, upheld the Attorney General in such cases on the rationale that this is an exercise of his common law powers. The note cited here reviews the litigation and comments adversely upon the Supreme Court's ruling on, inter alia, the ground that this is contrary to the intent of "home rule."

This Pennsylvania litigation is also discussed in University of Pennsylvania Law Review 99 (1951) 826-829, Temple Law Quarterly 24 (April 1951) 445-448, Virginia Law Review 37: 131-132, Yale Law Journal 60 (April 1961) 559-565. The Yale Law Journal note discusses the precedents from other states in somewhat greater detail. The Virginia Law Review note, in contrast to the Pennsylvania and Temple notes, finds merit in the Supreme Court ruling as a means of permitting centralized control over local Prosecutor's decisions.

67. John G. Heinberg, "Centralization in Federal Prosecutions," University of Missouri Law Review 15 (June 1950) 244-58.

Discussion of headquarters-field administrative relationships within the Department of Justice by a political scientist. Heinberg emphasizes the strong orientation of the U. S. District Attorneys (and their staffs) to the local area and the orientation of such personnel to law practice rather than to prosecution. Consequently, turnover is relatively high.

The effort at headquarters control is made through standardized manuals, sets of instructions, etc., but ". . . control over the initiation of prosecutions is not general and uniform, it depends upon the type of criminal law violated." (Author's italics).The most stringent controls apply to internal revenue problems, in the enterest of a uniform national policy, and such matters initiate with the Internal Revenue authorities, and, thence, to the Tax Division of the Department of Justice. Other criminal matters are less closely controlled.

Dismissals and exercises of nolle prosequi require a memorandum of approval from the Department of Justice, except in urgent circumstances where the U.S. Attorney must then justify to Washington his exercise of discretion. Controls are also exercised through the appointments of Special Assistants to the Attorney General who work with the local U.S. Attorneys on grand jury proceedings, trials, etc. which are of major interest to the Department. U.S. Attorneys regard their relationships to the Special Assistants as favorable about twice as often as they regard them as unfavorable, to judge from responses from the one Administrative Conference record available to the author. U. S. Attorneys strongly desire Hatch Act limitations to be repealed.

68. J. Martin Lawless, "The Relationship between the Attorney-General and the State's Attorney in Illinois," University of Illinois Law Forum, (1949) 507-514.

This note discusses the extent to which the Attorney-General and the State's Attorney (an officer elected at the County level in Illinois) each possesses by constitutional grant common law powers which the legislature cannot alter. The tendency of the note is that the State's Attorney is not subordinate to the Attorney-General. The author recommends a constitutional amendment to change this relationship. (cf., item 43).

69. "Prosecutor's Discretion," University of Pennsylvania Law Review, 103 (June 1955) 1057.

In this well-documented article, the author concludes that increased public interest in the administration of the law, and greater attention by the Attorney-General to prosecutorial discretion would be far more effective controls on prosecutor discretion than would additional legislation.

70. "Roleof the Prosecutor in Utah," Utah Law Review, 15 (Spring 1956) 70.

This article is based upon interview data, correspondence, and "rggular legal research" with prosecutors in Utah. Utah had a three-level system in which couty attorneys (not then required to be lawyers) responsible for certain minor cases, district attorneys, and the Attorney General were all participatnt. The author's objective is to indicate how effectively the system served the norms of efficient prosecution, expeditious trial of accused persons, and uniformity ("at the same time giviing donsideration to local policies.") Students will find particular assistance in a detailed appendix (which must be used carefully because of dating) which describes the consfitutional and statutory allocations of responsibility to county, district, and state prosecuting officials in the then forty-eight states.

71. L. B. Schwartz, "Federal Criminal Jurisdiction and Prosecutors Discretion." Law and Contemporary Problems. 13 (1948) 64-87.

Schwartz broadly reviews the steady growth of Federal criminal jurisdiction with attention to the circumstances under which prosecution should be initiated and the role of the U.S. district attorney in initiating such prosecutions. There is, he suggests, no purpose in debating whether there ought to be a significant Federal criminal jurisdiction, for it exists but ". . . with the present arsenal of federal criminal statutes, the discretion of the Department of Justice is replacing the command of Congress in determining the working line between federal and state enforcement activities. The United States district attorney can generally find some federal hold on a situation. What are the considerations which lead him to act or to withhold his hand?" Schwartz suggests that the major considerations which ought to be relevant are (1) whether the action is a major challenge to Federal authority or policy so that a "self-defensive" prosecution is required, (2) whether it is administratively appropriate in view of the magnitude of the particular issue and the exsitence of relevant state machinery and legislation, and (3) whether it will seriously overload the Federal administration or the Federal courts.

In order to aid in a more rational Federal criminal jurisdiction, Schwartz suggests four lines of development. "(1) The evolution of a broader, more uniform jurisdictional formula for federal criminal statutes; (2) the expansion of the power of the United States Commissioners to try petty offenses; (3) an express authorization by Congress of a general policy of remitting local offenders to local authority; (4) articulation by the Department of Justice of a complete set of standards of this discretion to withhold federal prosecution."

72. J. H. Skolnick, "Social Control in the Adversery System," Journal of Conflict Resolution, 11 (Mar. 1967)52-70.

The author contends that the ideal of the adversary system of criminal proceedings is based on the element of conflict and challenge between the prosecution and defense attorney in the courtroom. Social control is needed to maintain the truly competitive procedure, but an understanding of the reality is necessary before action can be taken. He explains that both the prosecutor and defendant are under pressure to reduce the conflict and bargain outside of court. The prosecution must keep the trail schedule intact, reduce the time and money he spends on cases and look good in the courtroom. The defendant must preserve his client from the wrath of the prosecutor who wants to settle out of coura dn also maintain a good court record. Because of these pressures much cooperation and teamwork take place between the two in pre-trial bargaining sessions rather than courtroom competition on which may yield more just results.

73. R. R. Temple, "What Ails County Justice," National Municipal Review, 36 (1947) 376-81.

The author argues that mixing judicial and executive functions of independent local officials results in confusion and inefficiency. He suggests, among other things, that the county clerk's office should be made appointive and reorganized, that a sheriff's duties should be lightened, the constable's office should be abolished, and the coroner'be replaced my medical examiner.

74. G. L. Williams, "Power to Prosecute," Criminal Law Review, 1955 (Oct.-Nov. 1955) 596, 688,

These articles on English rules and practice discuss private prosecutions, police prosecutions, the director of public prosecutions and governmental prosecutions. In addition, after citing supportive cases, the author discusses legal requirements of official action and continues by examining local authorities and corporations, as prosecutors. In concluding, he attemptos to define the place of private prosecution in modern society.

75. P. W. Williams, "Through the Looking Glass: The Office of the U. S. Attorney," Practical Lawyer, 3 (Nov. 1957) 46.

Description of organization and procedure in the Office of the U. S. Attorney.

General

76. William J. Brennan, Jr., "Criminal Prosecution: Sporting Event or Quest for Truth?" Washington University Law Quarterly 1963 (Jan. 1963) 279-295.

Argument in favor of making the prosecution's documentary evidence known to defense in advance of trial.

77. A. J. Ferguson, "Right to Prosecute," Justice of the Peace, (Jan. 30, 1960) 124-63.

Discussion of the right of private prosecution in England.

78. Raymond T. Galvin and Paul R. Falzone, "The Administration of Criminal Justice in Michigan," Michigan Economic Record, 7 (Jan.-Feb. 1965) 34.

Review of the existing status of various agents (police, prosecution, courts) in the administration of criminal justice in light of the cost of such administration to the taxpayers. The cost of administering criminal justice accounts for a large portion of the budget of Michigan. With increasing urbanization, the cost will become increased also.

79. Earle Stanley Gardner, "Need for New Concepts in the Administration of Criminal Justice: Deficiencies in our Present Procedures and Practices;" Journal of Criminal Law, 50 (May-June 1959) 20-6.

Gardner argues that the prosecutors have increasingly been able to represent themselves as representatives of the interest of the community, so that the defense is increasingly handicapped in criminal trials. The inability of defense counsel, as he sees it, to provide adequate representation for defendants is that defense is too much engaged in seeking for legal technicalities while tending to handicap itself by implicity accepting the prosecution's "theory of the case." Gardner's argument is that the remedies lie in less emphasis on technical obfuscation and greater emphasis on scientific procedures.

80. Fred E. Inbau, "The Social and Ethical Requirements of a Criminal Prosecutor," Journal of Criminal Law, 52 (July-August 1961) 209.

Inbau does not have deal with discretion in the prosecutor's office so much as with the relationship between the police and the courts. A strong advocate of greater latitude for the police, he argues that judicial constraints have become excessive for at least three reasons (1) that it "has become far too fashionable for in judicial circles to line up 'on the liberal side'" in search of reputation, (2) that police advocates are relatively weak in the skills of exposition so that the civil-liberties case gets a disproportionate share of attention, in contrast to the case for police latitude, and (3) that civil liberties advocates "rush in" and "stamp out" the case for police latitude if it seems to be getting effective attention. "The Courts," says Inbau, "have no right to police the police. That is an executive and not a judicial function. Furthermore the courts have enough troubles of their own. Witness what goes on in some of the municipal or magistrate courts of our large cities. In my opinion there are, in such courts, more hurts to the innocent and more trampling over basic individual civil liberties and ethical considerations

than you will find in most police departments. Much of the concern, energy, and effort that the courts expend with respect to police conduct could be better spent on getting their own house in order.

81. "Information, Indictment, and Arraignment," /From a symposium -- Criminal Procedure in Illinois/ University of Illinois Law Forum 1953 (Fall 1953) 313-443.

A description of procedures in Illinois.

82. Newman, Donald J., "Conviction, the Determination of Guilt or Innocence without Trial, 1966, Little Brown and Company, Boston.

The book focuses on the administration of Criminal Justice. The author has stressed four aspects of criminal justice. (a) the discretion which many trial judges exercise in aquitting or in reducing charges against defendants because it appears to the judge that conviction or conviction of more serious offense would be inappropriate, (b) the guilty plea, process, including bargaining for pleas, (c) the use by the trial judge of his aquittal power to control the overall system of criminal justice, (d) the role of defense counsel, particularly in serving the client by informal process like plea bargaining. The author also discusses what he calls "the aquittal of the guilty." By this he means discharging of the defendant by the prosecution inspite of sufficient evidence on the ground of fairness, public justice or administrative expediency.

83. C. F. Robinson, "Police and Prosecutor's Practices and Attitudes Relating to Interrogations as Revealed by Pre- and Post-Miranda Questionnaires," Duke Law Journel, 3 (June 1968) 30.

Both prior to and subsequent to the Supreme Court decision in Miranda, Arizona, the author sent questionnaires to police and prosecutors throughout the country, soliciting information concerning their interrogation practices and their attitude towards recent trends in law of interrogations. On the basis of data collected the author concludes that, judicial adoption of specific rules governing police procedures is not likely to promote the creation of a national system of criminal justice. He gests that, there be a realignment of roles, in which the ultimate res responsibility for policies, now assumed to be police business is shifted to the city government, the prosecutors and the legislature.

84. T. F. Stevens, "United State's Attorney in Alaska, " Harvard Law School Bulletin, 8 (Feb. 1957) 14.

Personal narrative and discursion of the problems faced by the prosecution where the defendant and the jury belong to a small closely-knit community.

III. BIBLIOGRAPHY WITHOUT NOTES*

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87. "Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future," New York University Intramural Law Review, 27 (May, 1967) 268.

88. "Criminal Law--Prosecutor's Closing Arguement--Improper Comment versus Prejudicial Infringement," DePaul Law Revue, 16 (Spr-Sum, 1967) 504.

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91. H. Epton, "Some Facts about County Attorneys in Oklahoma," Oklahoma Bar Association Journal, 25 (May 29, 1954) 1005-6.

92. L. J. Fein and Frederick Stockable, "The Subpeona Power of the Attorney General: A Review," East Lansing: Bureau of Social and Political Research Michigan State University, 1959.

93. O. Gorden, "Need to Eliminate Political Control of District Attorney's Office Urged," Panel, 15 (May-June 1957) 131.

94. R. Klein, "District Attorney's Discretion Not to Prosecute," Los Angeles Bar Bulletin, 32 (1957) 323.

95. M. F. McDonald, "Problems of a Prosecutor," New York State Bar Bulletin 24 (1952) 221-33.

96. "Metamorphosis in Criminal Court: A Symposium," Brief Case, 25 (December 1966) 52.

97. R. H. Mills, "Practicing Prosecutor--Beset with Conflicts," Illinois Bar Journal, 54 (March 1966) 606.

98. National Association of Attorneys-General Proceedings: 59th Annual Meeting in San Antonio, Nov, 1965, xii + p. ii, Council of State Government.

*These items are included for information, but could not be located in the libraries at University of Pittsburgh or Wayne State University when the student assistants were working on the search.

99. "Prosecutor's Privilege to Withhold the Identify of an Informer," Washburn Law Journal, 7 (Fall 1957)

100. "Prosecutor's Pre-Trial Invocation of Informer's Privilege Held Not Constitutionally Objectionable Per Se," St. John Law Review, 42 (Oct. '67)

101. H. B. Rothblatt, "Penal Code Section 654: Prosecutor's Dilemma," in Criminal Law and Criminal Procedures: A Symposium," Rastings Law Journal, 17 (Oct. 1965) 3.

102. B. F. Sears, "Comspiracy--Final Argument for the Prosecution," Trial Lawyers' Guide, 10 (May 1966) 7.

103. "Standards of Conduct for Prosecution and Defense Personnel: A Symposium," American Criminal Law Quarterly, 5 (Fall, 1966) 8.

104. D. C. Sullivan, "Prosecuting Attorney's Duty to Disclose," Washburn Law Journal, 6 (Spring 1967) 479.

105. A. K. Stavely, "Hints for County Prosecutors," Journal of the Bar Association of Kansas, 17 (May 1949) 387.

THE POLITICS OF PROSECUTION: Notes for a Research Program*

The function of this note is to lay out some provisional ideas on possibilities for more useful study of the politics of prosecution. Politics as used here refers to an all-encompassing process for social control, for the "authoritative" allocation of values, or the deliberate distribution of advantages and disadvantages.[1] From this perspective, politics is found in private institutions quite as much as in public government, in the family as much as the trade union, the corporation as much as the church, and (if anyone cares) in the Boy Scout troop.

In this sense the ultimate political problem is the achievement and maintenance of public order, in the management of which problem "the legal system" is central. Most academic studies of the legal system have dealt, and still deal, with courts. From these judicial studies there has come a substantial body of empirical findings and some modest nuclei of empirical theory.[2] But my own conviction is that a proper understanding requires more serious attention to the administrative side.

One sort of administrative functionaries in public order are the "guardians"

or those in direct first-line contact with the persons or groups whose activities are to be regulated or controlled. The police are the prime guardians, but there are others, e.g. the social workers who deal with juvenile gangs and welfare inspectors who deal with relief clients.

Another sort are the "reviewers" who intervene between the guardians and the courts through some share in deciding what issues will go to the courts, and in what form those issues will be presented for adjudication.

If we stipulate our premise that a decision-maker's potential power is inversely related to external parties' capacity to observe, and alter his decisions, then we infer that the prosecutor ought to be a particularly influential reviewer. It is the prosecutors who hold wide discretionary powers to withhold, to initiate, and to manage the investigation, the grand jury action, and the actual prosecution. Those against whom prosecutors direct their powers are thus subjected to the psychic sanctions of impaired reputation, to the monetary and time costs of defense, and -- in the event of conviction -- to loss of life, freedom, or property.

This is what we would expect, but it is not clear how far the available literature provides a basis for deciding that the expectation has been supported or refuted. The literature actually deals with five major questions.

(1) What is the proper method of recruiting prosecutors -- by "political" channels or by more "neutral" means?

(2) Is the prosecutor best conceived as a quasi-judicial officer with as much responsibility to the accused as to any other party or is the prosecutor an advocate whose responsibility is to win the trial-of-wits in which he is a participant?

(3) How much bargaining is there between prosecution and defense, and how much should there be?

(4) How much latitude should the prosecutor be allowed in managing the trial, a question reflected in the different definitions of the same behavior as

This means that there are supposed to be prior ground rules for relevance, more logical than by convention. Although this has worked relatively well for some topics, social scientists have surely not applied it to prosecution on any significant scale.

I do not know why this is so. But four factors seem to me probably relevant. (1) In contrast to lawyers, social scientists tend to be interested in diffuse and broad issues rather than in very concrete, practical problems. Consequently, they have been unable to elicit lawyers' interest and cooperation, although that is surely necessary. (2) In contrast to judicial behavior, prosecutorial behavior is not so easily reflected in an open public record. It is likely to be "invisible" -- or nearly so -- and open to observation only by delicate and confidential means (such as participant--observation)[4] which we have yet to perfect. (3) Particularly in the course of the behavioral revolution, we have tended to minimize competence in the technical understanding of law, so that we are limited on our ability to interpret the meaning of prosecutorial behavior.* (4) Finally, the importance of prosecution as a social activity has not been generally recognized. As a result the granting agencies and research planning committees - such as the foundations and the Social Science Research Council - have not offered the financial support and the moral support which so often structures what will and will not become prime research topics.

My own conception is that some of these constraints are now being modified. Certainly, the growing interest in the administrative realities of the legal process -- presently most reflected in studies of police behavior and institutional[5] should easily be generalizable to the whole administrative side of the legal system, including prosecution. This should be reinforced by the concern for equality in

*Arthur J. Vidich, Joseph Bensman, and Maurice R. Stein (eds.), Reflections on Community Studies, New York: John Wiley and Sons, Inc., 1964.

the administration of justice, perhaps most clearly formulated by those who concerned about the differences the law of the affluent and the law of the ppor.

If we wish to pick up this thread, are there some obvious categories upon which to focus? I suggest that the available literature steers us to five: prosecutorial recruitment, role-definition, decision-making or role-performance (including pre-trial discretionary actions and trial management), and the payoffs for prosecutors.

1. Recruitment: How Are Prosecutors Chosen?

With rare exceptions, the literature tends to discuss prosecutorial recruitment in terms of the formal-legal requirements for choice. In most states, this means that the head of the office, in any event, is elected, mostly through the mechanism of partisan nomination and election. Yet there is nothing clearer than that the formal-legal rules of election usually are not good guides to the ways in which people will get nominated or get elected.

To what extent, for example, is it true that the people who control nominations regard the prosecutor as a likely candidate for promotion to higher office (as state attorneys-general often appear to be automatic candidates for Governor)? What must a man have in his background to be a "good prospect" for prosecutor? What deals is he required to make about the conduct of his office, if any? Is there a contest between the organized bar and the organized political party for control of prosecutorial nominations and elections? What is the mechanism for recruitment of assistant prosecutors,ie. party patronage? Civil Service? To what extent is there a stability in the ranks of assistant prosecutors sufficient to limit the discretion of the head of the office?

2. Role Definition

The central issue here seems to be: what is the proper function of the public prosecutor -- to stand mainly as advocate for one side, seeking convictions within the adversary process, or to stand quasi-judically with as much concern for

the interests of the defendant as of the state?

S. G. Hobbs (item no. 19) has a much cited article which claims that the former is the dominant pattern. Whitney North Seymour, Jr. (item no. 24) indicates are both appropriate, bu at different times.

At present it simply is not clear what the main role conceptions are, in the prosecutors' offices, in the legal profession, or in the larger collectivity. Detailed survey analysis (cf., Janowitz and Wright, Public Administration and the Public) and content analysis of the legal literature would both be helpful here.

Such statements of appropriate roles as those by Hobbs and Seymour would provide guidance to the scholar seeking to set up hypotheses for observing the actual processes of decision in a prosecutor's office. To what is a prosecutor sensitive as he makes such a decision? Similarly, Hoey (item No. 29), argues that one of the prosecutor's functions is to elicit public support for a campaign against organized crime. What are the strategies and tactics which prosecutors seem to find relevant in acting upon this role conception? Is this a model statement of the role conception or is it highly atypical? To what extent is this consistent with the role of prosecutor as defined by the professional body of opinion?

3. Decision-Making: How Prosecutors Actually Do Their Jobs

Judge Jerome Frank wrote once (Courts on Trial) that "to rid ourselves of unfair prosecutors, we should not permit any man to holm that office who has not been specially educated for that job and passes stiff written and oral examinations demonstrating his moral and intellectual fitness." Frank's proposition can be restated to mean that background is a (or perhaps, the) primary determinant of behavior of judges) which does seem to relate decisional tendencies to class, ethnicity, and professional status. (Stuart Nagel reports, for instance, that judges associated with the ABA tended to impose more severe sentences than judges not associated with the ABA).[7] Yet such a conclusion must be treated most gingerly,

for there is other evidence in which no perceptible relationship between the backgrounds of prosecutors and their behaviors in office could be ascertained. (Cf., Jacob, item number 5, above.)

It may, from our point of view, then be important to go directly to the central issue of this paper and find ways to study the actual decision-making behavior of prosecuting officials.

When do prosecutors decide that particular matters are worth their investigative resources? How much of this is ritual and how much is actually intended by the prosecutor to change the situation being investigated? When do they decide that particular matters should be called to the attention of the grand jury? How and why do they decide that one case requires the nolle prosequi while an apparently similar case requires a vigorous prosecution?

It may be suggested that study will show that, in these matters, prosecutors' offices are responsive to at least four sets of claims, some of which will have been internalized by prosecutors and some of which will be received only as external demands.

1. One set of claims arises out of the polity in which the prosecutor functions.

2. As a "political" official in the more limited sense, he probably is somewhat responsive to the standards of the specific political organization or clique with which he is associated, as well as to the general rules of the subculture of the politicians.

3. As a lawyer, he probably carries certain role definitions which are part of his formal schooling (which seems to me a much more deliberate and conscious process of re-socialization than occurs in many otherforms of higher education) and that this is somewhat buttressed by his awareness that most of his professional associates in private practice will be sitting in judgment on him as a lawyer.

4. As a participant in the management of coercion, he is probably responsive

to criteria of administration and of the necessity to work with other participants in the coercive machinery. Thus, the prosecutor may be expected somewhat to adopt the criteria of the policeman (among others) in assessing the nature and direction of his work, which would lead to his greater sympathy for the police (which in what Judge Frank apparently means by his stricture on prosecutors' "tacit approval" of "third-detree" practices.)[3]

If the task is to estimate how prosecutors combine or avoid these influences, it may be fruitful to inquire upon two planes. One plane may represent the targets of action by the prosecutor, i.e. those against whom his powers are directed. The other target may represent the type of action which he is at that time free to take, i.e. investigative, indicting, or trying. How might one secure hypotheses and data?

First: the legal case materials themselves provide much material which may be of use at this stage when the subject is very much under-developed. For example, it would seem possible to take all the reported cases in which forensic misconduct loomed as a major issue and further group them according to the kind of forensic misconduct involved: appeals to community prejudice against an ethnic group, denigration of the defendant as a person, misleading the jury as to its function, etc. It would also be possible to classify the jurisdictions in which such cases arose., and from this one might derive some crude notions about the kinds of communities and the kinds of occasions on which -- at the trial stage -- prosecutors tended to penalize particular kinds of persons. This procedure would, of course, be relevant only to those aspects of prosecutorial decision which should have come into the public record via the trial.

Second: in order to reach some knowledge of materials not so reported, the urban prosecutors' offices would seem particulary strategic points to begin. Since there is a fairly high turnover amongst assistant prosecutors, a series of interviews with assistant prosecutors (current and past) would seem to be possible. The recollections would not necessarily be complete or accurate, but they would tend to

show certain major patterns (e.g. always investigating complaints alleging corruption) which would then provide the nuclei of hypotheses. (Such an inquiry might be supported by an independent search of court records, newspaper reports, etc.)

Third: the technique just suggested might also lead into direct observation of the operations of the prosecutors' offices (assuming the problem of access could be managed),[9] so as to appraise the utility of the ideas which a research might have developed in the previously suggested inquiries.

In principle, the very largest metropolitan areas (defined as those with central cities of half-a-million or more) could be covered entirely, although it would be necessary to choose some sampling device to take account of medium and small urban areas and of primarily rural counties.)* Finally, it would be most useful to test the hypotheses evolving out of this process, at least retrospectively, by making detailed studies of significant issues in which the prosecutor had a distinct impact either by abstention or by intervention. Only to illustrate the latter sort of action, let us note the Richard Morrison case -- an episode in which a young, self-confessed burglar was able to incriminate many policemen only because the then State's Attorney was at political odds with the City Administration and found this a convenient episode to exploit. The byproduct of this intervention was a public scandal of major proportions which lead to a complet reorganization of the Chicago Police Department, in ways quite at variance with those normally to be anticipated in Chicago politics.

5. Payoffs: What Are the Results for Prosecutors?

Finally, we must ask what prosecutors themselves get out of it. Sayre and Kaufman (referring to the subsequent political careers of Dewey, Charles S. Whitman, William O'Dwyer and others) express the judgment that the District Attorney's

*The work of Baker and DeLong, of Moley, and of the various students cited by Jacob at p. 77, n. 2 might constitute useful baselines here.

office . . . is sufficiently often an avenue to higher position in the political world to give the District Attorney special prestige among other officials and groups with whom he must deal."[9a] The Brown-Warren syndrome in California, the Edward Brooks syndrome in Massachusetts, and other dramatic examples tend to reinforce the image of "Mr. District Attorney" as a candidate for Governor, Senate, or White House. Yet one can choose other urban areas in which the record of promotion from the District Attorney's office is unimpressive by the Sayre-Kaufman criterion.

Illinois (which will be familiar to those who read Gottfried's biography of Cermak) is such a case. Gottfried's example (Robert E. Crowe) was an active political figure in the 1920's and after, but neither Crowe nor any of his successors in the State's Attorney's office has made it to the gubernatorial chair in Springfield (or the Mayoralty in Chicago, which would also be a promotion in that context) and only one (Thomas J. Courtney, Democrat) has even received the gubernatorial nomination (1944). Moreover, no Attorney General of the State has made it to the governorship in that period. The sole "law enforcement" candidate to achieve the Governorship was Dwight H. Green (1940) who, as U.S. Attorney, had prosecuted Al Capone for income tax evasion.

Similarly, Richard J. Dillworth of Philadelphia (of. item no. 3) was never able to make the transition beyond Philadelphia, despite a dramatic beginning. From a cursory review, the prosecutors in Wayne County, Michigan (Detroit), Cuyohoga County, Ohio (Cleveland), and Allegheny County, Pennsylvania (Pittsburgh) seem to have remarkabley unimpressive success in achieving higher office during the same general period that Dewey, O'Dwyer, Brown, and Warren were making successful headway.

There are at least two other aspects which may require some attention. (1) In some contexts, the office of Prosecutor may itself be so important locally that there are few other choices for a prosecutor which are equally worth his while. If this is so, it is then a terminal office because of its importance, which means that there are few other places worth the incumbent's trying to go. (It would, for example, be reasonable to anticipate that the smaller the jurisdiction, the fewer

the alternative bases of power, with the obvious implication that prosecutors in small, rural counties will tend to be more important locally than will their counterparts in such areas as Cook County, Allegheny County, or Manhattan). (2) We should also have to take account of the professional promotions from prosecutors' offices into more lucrative private practice than the prosecutor could have built up without the public exposure. (This seems to have been particularly important in providing avenues for trial lawyers for big-city law factories.)

The negative examples cited above are no more conclusive than the positive examples, but if they make the point that the existing evidence sustains no clear conclusion at all then it seems reasonably clear that a closer observation of the conditions for significant payoffs to prosecutors, and a better understanding what those payoffs might be, is important.

6. Consequences for the Polity

The sketchy suggestions above may, on reflection, turn out not to be very good, but the central problem surely can be agreed: it is to analyze the consequences of any particular pattern of prosecution for the overall structure of the polity?[10] It seems to be commonly believed that prosecution is sometimes used as an instrument of pressure, not merely against highly deviant individuals or groups, but against those who represent or embody large blocs of the population averse to the interests or preferences of those who control the instruments of prosecution. Gottfried rather obviously implies this in saying that a large contingent of Chicago lawyers "doubtless bearing in mind the states' attorneys useful nolle prosequi powers," joined the nomination campaign of a rather controversial incumbent.[11] In this, Gottfried seems in agreement with such legal scholars as Frank (Courts on Trial), Hurst (Growth of American Law), Pound (Criminal Justice in America), Puttkammer (Administration of Criminal Law) and with such political scientists as Gosnell (Machine Politics: Chicago Model), Moley (Politics and Criminal Prosecution), and Sayre and Kaufman (Governing New York City).

Moreover, the Gottfried hypothesis seems reinforced by commonsense experience, for one seldom encounters a practicing attorney who cannot tell one stories of the "how it really happens" variety. Occasionally some highly-placed observer puts statements on the record which fit this orientation. Somewhere in his diaries, Harold Ickes records that he desired the Department of Justice to act vigorously against the Kelly-Nahs machine in Chicago but, according to Ickes, the White House held the Department in check because it thought Kelly-Nash political support essential. Sindler brings the obverse phenomenon into his explanation of some political event as of the fight between President Roosevelt and the Long faction in Louisiana Democratic politics. Sindler is not quite explicit, but his account makes little sense unless he means to argue that the Federal Administration did manipulate income tax prosecutions of the Long group in order to force their acquiescence to the President's position in the Democratic party.[12]

None of the authors can validate the hypothesis by these but we should have to deny the little we do know of the ways of power were we to simply exclude the hypothesis.

Joseph A. Schlesinger has suggested another nucleur idea in his discussion of access to the governorship:[13] that the political potentialities of a "law enforcement" office are enhanced by that relevance to the distribution of property and that "actually associated with the concept of law enforcement -- the carrying out of the criminal code." At first glance, this may seem self-evident, but on examination it may actually be both valuable (not self-evident) and wrong. That is, it would seem extremely difficult to show that "law enforcement" has been more important and more visible in New York than in Chicago. Similarly, it would be difficult to avoid the fact that American history between 1919 and 1940 was a vigorous series of battles over the distribution of property, else there would have been no a occasion for the events associated with the "Battle of the Running Bulls" at the Ford overpass (Detroit), in the Memorial Day violence of 1937 (Chicago), or the

nationwide series of disputes investigated by the LaFollette Committee. Since the enforcement or non-enforcement of state law (depending in part upon the discretionary actions of State Attorneys General and local prosecutors) was vital until the Wagner Act, one would have to suppose that the prosecutors would become highly visible political figures in most of the major industrial centers -- as they did not!

Prosecution depends upon the collective reaction to the intersection of an act deemed an offense (since there can be no crime without a prior law), the party by whom the act is committed (the offender), and the party against whom the act is committed (the victim). The important thing is whether the rest of the collectivity think this intersection demands reward, penalty, or neutrality.[14] Prosecution has different degrees of intensity depending upon four ranges of relevance.

1. Ordinary Crime is the action by the individual which violates the standard the collectivity supposes he ought to have followed, but which is interpreted as constituting no major threat to the collectivity. Thus, the collectivity takes relatively little interest (except in the spectator sense) in this sort of case, where the act rather than the actor may be emphasized, so that the disposition of the case may be left to the more nearly "automatic" workings of the decisional machinery. The only important question here is whether the rules of decision "automatically" weigh in favor of, or against, the particular individual offender.

2. Repugnant deviancy is also individual action, but it is defined chiefly in terms of its moral offense to the community. This involves the sort of action which is illegal, but in which no complaining party can be found, so that Edwin Schur refers to it as a crime "without victims."

3. Organized crime is actually the conduct of commerce (exchange) in defiance of the ordinary law, including defiance of the public control of physical violence. This is still definable as crime to the extent that the operations of those in defiance of the law may be contained and do not seem to threaten the most

of the people in the collectivity at any one time. (It is relevant, that for most citizens of Chicago during the era of the private gang wars, most people could regard the activities of the competing gangs with some detachment so long as they themselves were not involved.) The phenomenon of "organized crime" thus becomes a range in which the politics of prosecution is vital.

4. Finally, there is the range in which social conflict is actually the conflict of persistent factions, each contesting both the material interests and the revered symbols of the other. The stability of the collectivity which we call the political order is a function of the accommodations which smaller collectivities ("worms within the body politic" in the Hobbesian sense) reach or fail to reach. It is in this context that prosecution becomes most apparently relevant. But it is also relevant to the other situations, not continuously or in equal measure, but relevant nonetheless.

Our purpose is to find ways to understand the extent and the limits of prosecution as a politically relevant phenomenon. We may get a clearer view if we think of prosecution as a form of tamed violence, bound by procedures and understandings regarding who is to be prosecuted for what.* The importance of prosecution as a weapon of political conflict increases as faction increases, but the relationship is not simply linear. We have to assess prosecution as a weapon used as a community finds its place on a curve of political stability. At one end of the curve we may suppose the utopia of perfect consensus, and at the other we may suppose the anti-utopia of perfect anarchy. Obviously, neither ever quite exists, but prosecution takes different forms as the collectivity approaches the one or the other. The higher the consensus, the more the criminal prosecution will be directed at individuals and the more the proceeding will take aon elements of a dramatic morality play, in which the chief political question is to what extent

*Prosecution in this sense requires a legitimate forum, which is to say a court, and this brings us to Jack Peltason's observation that there can be no court without a community.

the prosecutor has but one choice to make if he is to maintain his reputation in the collectivity. (Thus, Leo Frank was not simply on trial as a man accused of murder, but as a "Jewish-capitalist-murderer" in a situation where Jewish-ness and wealth were repugnant, while murder was not uncommon.)

The more faction increases, the more relevant prosecution becomes. Hence, the experience of the Communist Party, the Teamster's Union Leaders, and others who were only technically tried for the named offenses. More realistically, they were prosecuted as factional advocates of a position which the dominant groups had come to see as extremely threatening. There are many examples of such situations, e.g., the Alien-and-Sedition Trials, the prosecutions of labor organizers at various times between the Civil War and the Wagner Act, or the more recent anti-barratry prosecutions of the NAACP in Alabama. The prosecutions of the various other black "Militants" in recent years should be even more to the point.

But the other side of the question, already suggested, is that as prosecution may become increasingly relevant as a political weapon, so it may also become after a point irrelevant. When the forms of political conflict depart from the symbolisms of words and the forms of law, politics returns to its elemental form as force and in this context prosecution also ceases to be relevant. When, for example, Patrice Lumumba was deposed, his enemies found it too constraining to deal with the forms of law so they, being temporarily dominant, simply took him out and shot him.

The problem of research and of theoretical construction is to specify more exactly the path along which collectivites move in the curve of stability and, by so specifying, to make more exact statements about the relevance of prosecution and its uses in ordinary situations as well as in crisis.

In a very broad sense, the preceeding suggestions (even if misdirected) take their intellectual roots from the Holnesian dictum that the life of the law

FOOTNOTES

1. Walton Hale Hamilton, The Politics of Industry, New York: Alfred A. Knopf, 1957, 6; David Easton, The Political System, New York: Alfred A. Knopf, 1953, 126-141; Lewis A. Froman, Jr., People and Politics, Englewood Cliffs, Prentice-Hall, Inc., 1962, 3; Marion J. Levy, Jr., The Structure of Society, Princeton: Princeton University Press, 1952; and, Neil McDonald, Politics, New Brunswick, New Jersey: Rutgers University Press, 1965.

2. Glendon A. Schubert, "Bibliographical Essay: Behavioral Research in Public Law, " American Political Science Review, Vol. 57, No. 2 (June 1963), pp. 433-445; Judicial Decision-Making, New York: Free Press of Glencoe, 1963; and Theodore L. Becker, "An Inquiry into a School of Thought in the Judicial Behavior Movement," Midwest Journal of Political Science, Vol. 7, No. 3 (August 1963), pp. 254-266.

3. John T. McNaughton and Henry M. Hart, Jr., "Some Aspects of Evidence and Inference in the Law," In Daniel Lerner (ed.), Evidence and Inference, Glencoe: Free Press, 1959, 70-72.

4. Matthew Holden, Jr., The Politics of Self-Defeat (Unpublished Manuscript, 1969, 4-8 and 8, n.1 offers some comment on the problem of participant-observation. By implication, this also raises the point that we need vast improvements in the "soft" techniques for research, which have been relative to the "hard" techniques--somewhat underdeveloped.

5. For instance, J. David Bordua (ed.), The Police, New York: John Wiley and Sons, Inc., 1967?; James W. Wilson, Varieties of Police Behavior, Cambridge: Harvard University Press, 1968; and, the several studies carried out for--or inspired by--the President's Commission on Law Enforcement and the Administration of Justice.

6. The Cole and the Eisenstein studies may be symptomatic.

7. As cited in, Herbert Jacob, Justice in America, Boston: Little, Brown and Company, 1964.

8. Courts on Trial: Myth and Reality in American Justice, Princeton: Princeton University Press, 1950, p. 99.

9. The problems involved in such direct observation are numerous, but often can be surmounted. Cf., Densman, Vidich and Stein (eds.) op. cit.

9a. Sayre and Kaufman, op. cit., p. 293.

10. From time to time, legal scholars advocate one or another reform in prosecution on the ground that existing practice detracts from "respect for law." In principle, they are raising an important question (although their discussion actually tends to be centered on another important question -- the extent to which the rights of individuals are threatened). For other thoughts on this point, cf., Matthew Holden, Jr., "Litigation and the Political Order," Western Political Quarterly, Vol. 16, No. 4 (December, 1963), pp. 771-781

11. Gottfried, op. cit.

12. Allan P. Sindler, Huey Long's Louisiana: State Politics, 1920-1952, Baltimore: Johns Hopkins Press, 1956, pp. 96, 118, 126-127 and 138-139.

13. Joseph A. Schlesinger, How They Became Governor, East Lansing: Governmental Research Bureau, Michigan State University, 1957, p.79.

14. Paul Bohannon, African Suicide and Homicide, Princeton: Princeton University Press, 196, p. describes the problem in tracing the indignant reaction of a Tiv who thought it manifestly unfair that he should have been given a three-year manslaughter sentence for killing a non-Tiv.

END