

The Decision to Prosecute

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This paper is based on an exploratory study of the Office of Prosecuting Attorney, King County (Seattle), Washington. The lack of social scientific knowledge about the prosecutor dictated the choice of this approach. An open-ended interview was administered to one-third of the former deputy prosecutors who had worked in the office during the ten year period 1955-1965. In addition, interviews were conducted with court employees, members of the bench, law enforcement officials, and others having reputations for participation in legal decision-making. Over fifty respondents were contacted during this phase. A final portion of the research placed the author in the role of observer in the prosecutor's office. This experience allowed for direct observation of all phases of the decision to prosecute so that the informal processes of the office could be noted. Discussions with the prosecutor's staff, judges, defendant's attorneys, and the police were held so that the interview data could be placed within an organizational context.

The primary goal of this investigation was to examine the role of the prosecuting attorney as an officer of the legal process within the context of the local political system. The analysis is therefore based on two assumptions. First, that the legal process is best understood as a subsystem of the larger political system. Because of this choice, emphasis is placed upon the interaction and goals of the individuals involved in decision-making. Second, and closely related to the first point, it is assumed that broadly conceived political considerations explained to a large extent "who gets or does not get—in what amount—and how, the good (justice) that is hopefully produced by the legal system" (Klonski and Mendelsohn, 1965: 323). By focusing upon the political and social linkages between these systems, it is expected that decision-making in the prosecutor's office will be viewed as a principal ingredient in the authoritative allocation of values.

THE PROSECUTOR'S OFFICE IN AN EXCHANGE SYSTEM

While observing the interrelated activities of the organizations in the legal process, one might ask, "Why do these agencies cooperate?" If the police refuse to transfer information to the prosecutor concerning the commission of a crime, what are the rewards or sanctions which might be brought against them? Is it possible that organizations maintain a form of "bureaucratic accounting" which, in a sense, keeps track of the resources allocated to an agency and the support returned? How are cues transmitted from one agency to another to influence decision-making? These are some of the questions which must be asked when decisions are viewed as an output of an exchange system.

The major findings of this study are placed within the context of an exchange system (Evan, 1965: 218).¹ This serves the heuristic purpose of focusing attention upon the linkages found between actors in the decision-making process. In place of the traditional assumptions that the agency is supported solely by statutory authority, this view recognizes that an organization has many clients with which it interacts and upon whom it is dependent for certain resources. As interdependent subunits of a system, then, the organization and its clients are engaged in a set of exchanges across their boundaries. These will involve a transfer of resources between the organizations which will affect the mutual achievement of goals.

The legal system may be viewed as a set of interorganizational exchange relationships analogous to what Long (1962: 142) has called a community game. The participants in the legal system (game) share a common territorial field and collaborate for different and particular ends. They interact on a continuing basis as their responsibilities demand contact with other participants in the process. Thus, the need for the cooperation of other participants can have a bearing on the decision to prosecute. A decision not to prosecute a narcotics offender may be a move to pressure the United States' Attorney's Office to cooperate on another case. It is obvious that bargaining occurs not only between the major actors in a case—the prosecutor and the defense attorney—but also between the clientele groups that are influential in structuring the actions of the prosecuting attorney.

Exchanges do not simply "sail" from one system to another, but take place in an institutionalized setting which may be compared to a market. In the market, decisions are made between individuals who occupy boundary-spanning roles, and who set the conditions under which the exchange will occur. In the legal system, this may merely mean that a representative of the parole board agrees to forward a recommendation to the prosecutor, or it could mean that there is extended bargaining between a deputy prosecutor and a defense attorney. In the study of the King County Prosecutor's Office,

it was found that most decisions resulted from some type of exchange relationship. The deputies interacted almost constantly with the police and criminal lawyers, while the prosecutor was more closely linked to exchange relations with the courts, community leaders, and the county commissioners.

THE PROSECUTOR'S CLIENTELE

In an exchange system, power is largely dependent upon the ability of an organization to create clientele relationships which will support and enhance the needs of the agency. For, although interdependence is characteristic of the legal system, competition with other public agencies for support also exists.

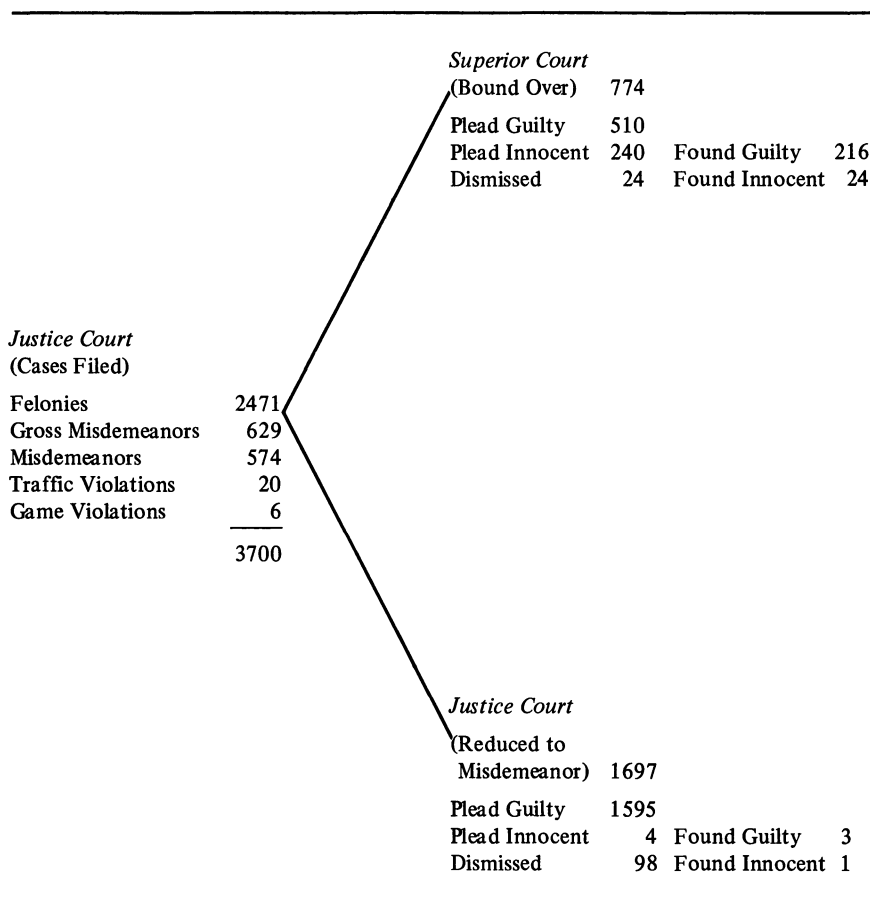


Figure 1. DISPOSITION OF FELONY CASES—KING COUNTY, 1964

Since organizations operate in an economy of scarcity, the organization must exist in a favorable power position in relation to its clientele. Reciprocal and unique claims are made by the organization and its clients. Thus, rather than being oriented toward only one public, an organization is beholden to several publics, some visible and others seen clearly only from the pinnacle of leadership. As Gore (1964: 23) notes, when these claims are “firmly anchored inside the organization and the lines drawn taut, the tensions between conflicting claims form a net serving as the institutional base for the organization.”

An indication of the stresses within the judicial system may be obtained by analyzing its outputs. It has been suggested that the administration of justice is a selective process in which only those cases which do not create strains in the organization will ultimately reach the courtroom (Chambliss, 1969: 84). As noted in Figure 1, the system operates so that only a small number of cases arrive for trial, the rest being disposed of through reduced charges, *nolle pros.*, and guilty pleas.² Not indicated are those cases removed by the police and prosecutor prior to the filing of charges. As the focal organization in an exchange system, the office of prosecuting attorney makes decisions which reflect the influence of its clientele. Because of the scarcity of resources, marketlike relationships, and the organizational needs of the system, prosecutorial decision-making emphasizes the accommodations which are made to the needs of participants in the process.

Police

Although the prosecuting attorney has discretionary power to determine the disposition of cases, this power is limited by the fact that usually he is dependent upon the police for inputs to the system of cases and evidence. The prosecutor does not have the investigative resources necessary to exercise the kind of affirmative control over the types of cases that are brought to him. In this relationship, the prosecutor is not without countervailing power. His main check on the police is his ability to return cases to them for further investigation and to refuse to approve arrest warrants. By maintaining cordial relations with the press, a prosecutor is often able to focus attention on the police when the public becomes aroused by incidents of crime. As the King County prosecutor emphasized, “That [investigation] is the job for the sheriff and police. It’s their job to bring me the charges.” As noted by many respondents, the police, in turn, are dependent upon the prosecutor to accept the output of their system; rejection of too many cases can have serious repercussions affecting the morale, discipline, and workload of the force.

A request for prosecution may be rejected for a number of reasons relating to questions of evidence. Not only must the prosecutor believe that the

evidence will secure a conviction, but he must also be aware of community norms relating to the type of acts that should be prosecuted. King County deputy prosecutors noted that charges were never filed when a case involved attempted suicide or fornication. In other actions, the heinous nature of the crime, together with the expected public reaction, may force both the police and prosecutor to press for conviction when evidence is less than satisfactory. As one deputy noted, "In that case [murder and molestation of a six-year-old girl] there was nothing that we could do. As you know the press was on our back and every parent was concerned. Politically, the prosecutor had to seek an information."

Factors other than those relating to evidence may require that the prosecutor refuse to accept a case from the police. First, the prosecuting attorney serves as a regulator of case loads not only for his own office, but for the rest of the legal system. Constitutional and statutory time limits prevent him and the courts from building a backlog of untried cases. In King County, when the system reached the "overload point," there was a tendency to be more selective in choosing the cases to be accepted. A second reason for rejecting prosecution requests may stem from the fact that the prosecutor is thinking of his public exposure in the courtroom. He does not want to take forward cases which will place him in an embarrassing position. Finally, the prosecutor may return cases to check the quality of police work. As a former chief criminal deputy said, "You have to keep them on their toes, otherwise they get lazy. If they aren't doing their job, send the case back and then leak the situation to the newspapers." Rather than spend the resources necessary to find additional evidence, the police may dispose of a case by sending it back to the prosecutor on a lesser charge, implement the "copping out" machinery leading to a guilty plea, drop the case, or in some instances send it to the city prosecutor for action in municipal court.

In most instances, a deputy prosecutor and the police officer assigned to the case occupy the boundary-spanning roles in this exchange relationship. Prosecutors reported that after repeated contacts they got to know the policemen whom they could trust. As one female deputy commented, "There are some you can trust, others you have to watch because they are trying to get rid of cases on you." Deputies may be influenced by the police officer's attitude on a case. One officer noted to a prosecutor that he knew he had a weak case, but mumbled, "I didn't want to bring it up here, but that's what they [his superiors] wanted." As might be expected, the deputy turned down prosecution.

Sometimes the police perform the ritual of "shopping around," seeking to find a deputy prosecutor who, on the basis of past experience, is liable to be sympathetic to their view on a case. At one time, deputies were given complete authority to make the crucial decisions without coordinating their

activities with other staff members. In this way the arresting officer would search the prosecutor's office to find a deputy he thought would be sympathetic to the police attitude. As a former deputy noted, "This meant that there were no departmental policies concerning the treatment to be accorded various types of cases. It pretty much depended upon the police and their luck in finding the deputy they wanted." Prosecutors are now instructed to ascertain from the police officer if he has seen another deputy on the case. Even under this more centralized system, it is still possible for the police to request a specific deputy or delay presentation of the case until the "correct" prosecutor is available. Often a prosecutor will gain a reputation for specializing in one type of case. This may mean that the police will assume he will get the case anyway, so they skirt the formal procedure and bring it to him directly.

An exchange relationship between a deputy prosecutor and a police officer may be influenced by the type of crime committed by the defendant. The prototype of a criminal is one who violates person and property. However, a large number of cases involve "crimes without victims" (Schur, 1965). This term refers to those crimes generally involving violations of moral codes, where the general public is theoretically the complainant. In violations of laws against bookmaking, prostitution, and narcotics, neither actor in the transaction is interested in having an arrest made. Hence, vice control men must drum up their own business. Without a civilian complainant, victimless crimes give the police and prosecutor greater leeway in determining the charges to be filed.

One area of exchange involving a victimless crime is that of narcotics control. As Skolnick (1966: 120) notes, "The major organizational requirement of narcotics policing is the presence of an informational system." Without a network of informers, it is impossible to capture addicts and peddlers with evidence that can bring about convictions. One source of informers is among those arrested for narcotics violations. Through promises to reduce charges or even to *nolle pros.*, arrangements can be made so that the accused will return to the narcotics community and gather information for the police. Bargaining observed between the head of the narcotics squad of the Seattle Police and the deputy prosecutor who specialized in drug cases involved the question of charges, promises, and the release of an arrested narcotics pusher.

In the course of postarrest questioning by the police, a well-known drug peddler intimated that he could provide evidence against a pharmacist suspected by the police of illegally selling narcotics. Not only did the police representative want to transfer the case to the friendlier hands of this deputy, but he also wanted to arrange for a reduction of charges and bail. The police officer believed that it was important that the accused be let out in such a

way that the narcotics community would not realize that he had become an informer. He also wanted to be sure that the reduced charges would be processed so that the informer could be kept on the string, thus allowing the narcotics squad to maintain control over him. The deputy prosecutor, on the other hand, said that he wanted to make sure that procedures were followed so that the action would not bring discredit on his office. He also suggested that the narcotics squad “work a little harder” on a pending case as a means of returning the favor.

Courts

The ways used by the court to dispose of cases is a vital influence in the system. The court’s actions effect pressures upon the prison, the conviction rate of the prosecutor, and the work of probation agencies. The judge’s decisions act as clues to other parts of the system, indicating the type of action likely to be taken in future cases. As noted by a King County judge, “When the number of prisoners gets to the ‘riot point,’ the warden puts pressure on us to slow down the flow. This often means that men are let out on parole and the number of people given probation and suspended sentences increases.” Under such conditions, it would be expected that the prosecutor would respond to the judge’s actions by reducing the inputs to the court either by not preferring charges or by increasing the pressure for guilty pleas through bargaining. The adjustments of other parts of the system could be expected to follow. For instance, the police might sense the lack of interest of the prosecutor in accepting charges, hence they will send only airtight cases to him for indictment.

The influence of the court on the decision to prosecute is very real. The sentencing history of each judge gives the prosecutor, as well as other law enforcement officials, an indication of the treatment a case may receive in the courtroom. The prosecutor’s expectation as to whether the court will convict may limit his discretion over the decisions on whether to prosecute. “There is great concern as to whose court a case will be assigned. After Judge _____ threw out three cases in a row in which entrapment was involved, the police did not want us to take any cases to him.” Since the prosecutor depends upon the plea-bargaining machinery to maintain the flow of cases from his office, the sentencing actions of judges must be predictable. If the defendant and his lawyer are to be influenced to accept a lesser charge or the promise of a lighter sentence in exchange for a plea of guilty, there must be some basis for belief that the judge will fulfill his part of the arrangement. Because judges are unable formally to announce their agreement with the details of the bargain, their past performance acts as a guide.

Within the limits imposed by law and the demands of the system, the prosecutor is able to regulate the flow of cases to the court. He may control the length of time between accusation and trial; hence he may hold cases until he has the evidence which will convict. Alternatively, he may seek repeated adjournment and continuances until the public's interest dies; problems such as witnesses becoming unavailable and similar difficulties make his request for dismissal of prosecution more justifiable. Further, he may determine the type of court to receive the case and the judge who will hear it. Many misdemeanors covered by state law are also violations of a city ordinance. It is a common practice for the prosecutor to send a misdemeanor case to the city prosecutor for processing in the municipal court when it is believed that a conviction may not be secured in justice court. As a deputy said, "If there is no case—send it over to the city court. Things are speedier, less formal, over there."

In the state of Washington, a person arrested on a felony charge must be given a preliminary hearing in a justice court within ten days. For the prosecutor, the preliminary hearing is an opportunity to evaluate the testimony of witnesses, assess the strength of the evidence, and try to predict the outcome of the case if it is sent to trial. On the basis of this evaluation, the prosecutor has several options: he may bind over the case for trial in Superior Court; he may reduce the charges to those of a misdemeanor for trial in Justice Court; or he may conclude that he has no case and drop the charges. The President Judge of the Justice Courts of King County estimated that about seventy percent of the felonies are reduced to misdemeanors after the preliminary hearing.

Besides having some leeway in determining the type of court in which to file a case, the prosecutor also has some flexibility in selecting the judge to receive the case. Until recently the prosecutor could file a case with a specific judge. "The trouble was that Judge _____ was erratic and independent, [so] no one would file with him. The other judges objected that they were handling the entire workload, so a central filing system was devised." Under this procedure cases are assigned to the judges in rotation. However, as the chief criminal deputy noted, "the prosecutor can hold a case until the 'correct' judge came up."

Defense Attorneys

With the increased specialization and institutionalization of the bar, it would seem that those individuals engaged in the practice of criminal law have been relegated, both by their profession and by the community, to a low status. The urban bar appears to be divided into three parts. First, there is an inner circle which handles the work of banks, utilities, and commercial

concerns; second, another circle includes plaintiff's lawyers representing interests opposed to those of the inner circle; and finally, an outer group scrapes out an existence by "haunting the courts in hope of picking up crumbs from the judicial table" (Ladinsky, 1963: 128). With the exception of a few highly proficient lawyers who have made a reputation by winning acquittal for their clients in difficult, highly publicized cases, most of the lawyers dealing with the King County Prosecutor's Office belong to this outer ring.

In this study, respondents were asked to identify those attorneys considered to be specialists in criminal law. Of the nearly 1,600 lawyers practicing in King County only eight can be placed in this category. Of this group, six were reported to enjoy the respect of the legal community, while the others were accused by many respondents of being involved in shady deals. A larger group of King County attorneys will accept criminal cases, but these lawyers do not consider themselves specialists. Several respondents noted that many lawyers, because of inexperience or age, were required to hang around the courthouse searching for clients. One Seattle attorney described the quality of legal talent available for criminal cases as "a few good criminal lawyers and a lot of young kids and old men. The good lawyers I can count on my fingers."

In a legal system where bargaining is a primary method of decision-making, it is not surprising that criminal lawyers find it essential to maintain close personal ties with the prosecutor and his staff. Respondents were quite open in revealing their dependence upon this close relationship to successfully pursue their careers. The nature of the criminal lawyer's work is such that his saleable product or service appears to be influence rather than technical proficiency in the law. Respondents hold the belief that clients are attracted partially on the basis of the attorney's reputation as a fixer, or as a shrewd bargainer.

There is a tendency for ex-deputy prosecutors in King County to enter the practice of criminal law. Because of his inside knowledge of the prosecutor's office and friendships made with court officials, the former deputy feels that he has an advantage over other criminal law practitioners. All of the former deputies interviewed said that they took criminal cases. Of the eight criminal law specialists, seven previously served as deputy prosecutors in King County, while the other was once prosecuting attorney in a rural county.

Because of the financial problems of the criminal lawyer's practice, it is necessary that he handle cases on an assembly-line basis, hoping to make a living from a large number of small fees. Referring to a fellow lawyer, one attorney said, "You should see _____. He goes up there to Carroll's office with a whole fist full of cases. He trades on some, bargains on others and never goes to court. It's amazing but it's the way he makes his living." There are incentives, therefore, to bargain with the prosecutor and other decision-

makers. The primary aim of the attorney in such circumstances is to reach an accommodation so that the time-consuming formal proceedings need not be implemented. As a Seattle attorney noted, "I can't make any money if I spend my time in a courtroom. I make mine on the telephone or in the prosecutor's office." One of the disturbing results of this arrangement is that instances were reported in which a bargain was reached between the attorney and deputy prosecutor on a "package deal." In this situation, an attorney's clients are treated as a group; the outcome of the bargaining is often an agreement whereby reduced charges will be achieved for some, in exchange for the unspoken assent by the lawyer that the prosecutor may proceed as he desires with the other cases. One member of the King County Bar has developed this practice to such a fine art that a deputy prosecutor said, "When you saw him coming into the office, you knew that he would be pleading guilty." At one time this situation was so widespread that the "prisoners up in the jail had a rating list which graded the attorneys as either 'good guys' or 'sell outs.'"

The exchange relationship between the defense attorney and the prosecutor is based on their need for cooperation in the discharge of their responsibilities. Most criminal lawyers are interested primarily in the speedy solution of cases because of their precarious financial situation. Since they must protect their professional reputations with their colleagues, judicial personnel, and potential clientele, however, they are not completely free to bargain solely with this objective. As one attorney noted, "You can't afford to let it get out that you are selling out your cases."

The prosecutor is also interested in the speedy processing of cases. This can only be achieved if the formal processes are not implemented. Not only does the pressure of his caseload influence bargaining, but also the legal process with its potential for delay and appeal, creates a degree of uncertainty which is not present in an exchange relationship with an attorney with whom you have dealt for a number of years. As the Presiding Judge of the Seattle District Court said, "Lawyers are helpful to the system. They are able to pull things together, work out a deal, keep the system moving."

Community Influentials

As part of the political system, the judicial process responds to the community environment. The King County study indicated that there are differential levels of influence within the community and that some people had a greater interest in the politics of prosecution than others. First, the general public is able to have its values translated into policies followed by law enforcement officers. The public's influence is particularly acute in those

gray areas of the law where full enforcement is not expected. Statutes may be enacted by legislatures defining the outer limits of criminal conduct, but they do not necessarily mean that laws are to be fully enforced to these limits. There are some laws defining behavior which the community no longer considers criminal. It can be expected that a prosecutor's charging policies will reflect this attitude. He may not prosecute violations of laws regulating some forms of gambling, certain sexual practices, or violations of Sunday Blue Laws.

Because the general public is a potential threat to the prosecutor, staff members take measures to protect him from criticism. Respondents agreed that decision-making occurs with the public in mind—"will a course of action arouse antipathy towards the prosecutor rather than the accused?" Several deputies mentioned what they called the "aggravation level" of a crime. This is a recognition that the commission of certain crimes, within a specific context, will bring about a vocal public reaction. "If a little girl, walking home from the grocery store, is pulled into the bushes and indecent liberties taken, this is more disturbing to the public's conscience than a case where the father of the girl takes indecent liberties with her at home." The office of King County Prosecuting Attorney has a policy requiring that deputies file all cases involving sexual molestation in which the police believe the girl's story is credible. The office also prefers charges in all negligent homicide cases where there is the least possibility of guilt. In such types of cases the public may respond to the emotional context of the case and demand prosecution. To cover the prosecutor from criticism, it is believed that the safest measure is to prosecute.

The bail system is also used to protect the prosecutor from criticism. Thus it is the policy to set bail at a high level with the expectation that the court will reduce the amount. "This looks good for Prosecutor Carroll. Takes the heat off of him, especially in morals cases. If the accused doesn't appear in court the prosecutor can't be blamed. The public gets upset when they know these types are out free." This is an example of exchange where one actor is shifting the responsibility and potential onus onto another. In turn, the court is under pressure from county jail officials to keep the prison population down.

A second community group having contact with the prosecutor is composed of those leaders who have a continuing or potential interest in the politics of prosecution. This group, analogous to the players in one of Long's community games, are linked to the prosecutor because his actions affect their success in playing another game. Hence community boosters want either a crackdown or a hands-off policy towards gambling, political leaders want the prosecutor to remember the interests of the party, and business leaders want policies which will not interfere with their own game.

Community leaders may receive special treatment by the prosecutor if they run afoul of the law. A policy of the King County Office requires that cases involving prominent members of the community be referred immediately to the chief criminal deputy and the prosecutor for their disposition. As one deputy noted, "These cases can be pretty touchy. It's important that the boss knows immediately about this type of case so that he is not caught 'flat footed' when asked about it by the press."

Pressure by an interest group was evidenced during a strike by drug store employees in 1964. The striking unions urged Prosecutor Carroll to invoke a state law which requires the presence of a licensed pharmacist if the drug store is open. Not only did union representatives meet with Carroll, but picket lines were set up outside the courthouse protesting his refusal to act. The prosecutor resisted the union's pressure tactics.

In recent years, the prosecutor's tolerance policy toward minor forms of gambling led to a number of conflicts with Seattle's mayor, the sheriff, and church organizations. After a decision was made to prohibit all forms of public gaming, the prosecutor was criticized by groups representing the tourist industry and such affected groups as the bartenders' union which thought the decision would have an adverse economic effect. As Prosecutor Carroll said, "I am always getting pressures from different interests—business, the Chamber of Commerce, and labor. I have to try and maintain a balance between them." In exchange for these considerations, the prosecutor may gain prestige, political support, and admission into the leadership groups of the community.

Summary

By viewing the King County Office of Prosecuting Attorney as the focal organization in an exchange system, data from this exploratory study suggests the market-like relationships which exist between actors in the system. Since prosecution operates in an environment of scarce resources and since the decisions have potential political ramifications, a variety of officials influence the allocation of justice. The decision to prosecute is not made at one point, but rather the prosecuting attorney has a number of options which he may employ during various stages of the proceedings. But the prosecutor is able to exercise his discretionary powers only within the network of exchange relationships. The police, court congestion, organizational strains, and community pressures are among the factors which influence prosecutorial behavior.

NOTES

1. See also Levine and White (1961: 583) and Blau (1955).
2. The lack of reliable criminal statistics is well known. These data were gathered from a number of sources, including King County (1964).

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